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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 8.

ANNIE R. KEAN ET AL., PLAINTIFFS IN ERROR,

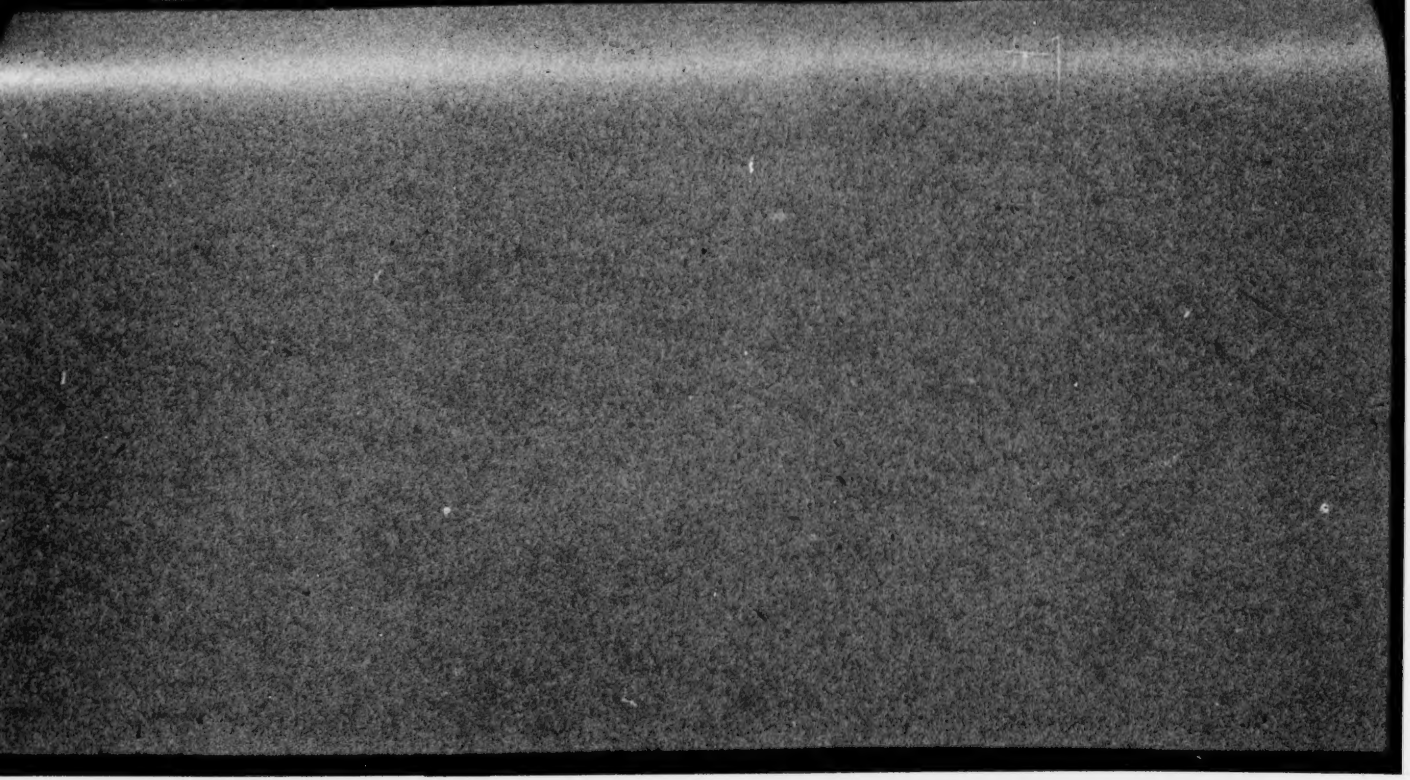
vs.

THE CALUMET CANAL AND IMPROVEMENT COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

FILED APRIL 28, 1902.

(17,730.)



(17,730.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 47.

ANNIE R. KEAN ET AL., PLAINTIFFS IN ERROR,

vs.

THE CALUMET CANAL AND IMPROVEMENT COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

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STATE OF INDIANA, }
In the Supreme Court. }

Be it remembered, that heretofore, to wit: on the 20th day of October, 1896, the same being the 128th judicial day of the November term of said court, Annie R. Kean, Samuel A. Kean, Henry Felt, Simon B. Felt, Sarah A. Smail and Charles Kreuter, by William Connell, their attorney, filed in the office of the clerk of the supreme court of Indiana, a transcript of the record and proceedings of the porter circuit court of said State in a cause wherein The Calumet Canal and Improvement Company was plaintiff, and Charles B. Alexander, *et al.*, were defendants, together with an assignment of errors endorsed thereon, which transcript and assignment of errors are in the words and figures following, to wit:

24 *Caption to Transcript from Lake Co.*

Was before the Honorable John H. Gillett, judge of the 31st judicial circuit of the State of Indiana and *ex officio* judge of the Porter circuit court, at a term of said court held at the court-house, in the city of Valparaiso, Porter county and State of Indiana, commencing on the 1st Monday of October, A. D. 1895.

CALUMET CANAL AND IMPROVEMENT COMPANY }
vs. } Complaint No. 7917.
CHARLES B. ALEXANDER ET AL. }

Be it remembered, that heretofore, to wit: on May 25th 1895, the following transcript of proceedings had in the Lake circuit court, in the above-entitled cause, was filed in the office of the clerk of the porter circuit court, and is in the words and figures following, to wit:

STATE OF INDIANA, }
County of Lake, } *ss:*

In the Lake Circuit Court, February Term, 1895.

Be it remembered, that heretofore, to wit: on February 5th, 1895, the same being the 2nd judicial day of the February term, 1895, of the Lake circuit court, begun and holden at the court-house in Crown Point, Lake county, Indiana, before the Honorable John H. Gillett, judge thereof, the following, among other proceedings were had in said court had and entered of record therein, to wit:

* * * * * * *

34 *Appearance & Default.*

And thereupon come the defendants, Henry B. Masen, and wife, and Anna R. Kean and Samuel A. Kean, by counsel, and enter their appearance herein, and thereupon all the defendants in this action except those so appearing are now each three times loudly called

and come not, but herein wholly make default, and it appearing to the court that said unknown defendants are minors under the age of twenty years, and that their names are unknown, John B. Peterson, a reputable attorney of this court, is appointed guardian *ad litem* of said minors, is sworn in open court and files his answer of and for said minors in these words (insert).

And afterwards, to wit; on May 18th, 1895, the same being the 24th judicial day of the April term, 1895, of the Lake circuit court, before the hon. judge aforesaid, the following further proceedings were by said court had and entered of record in said cause, to wit;

* * * * * * *

35–39 *Change of Venue.*

Affidavit for change of venue.

Thomas J. Wood, being duly sworn, deposes and says that he makes the following affidavit for and on behalf of the defendant in said cause, Samuel A. Kean, he being not present and a non-resident of the State of Indiana, and says that he verily believes that said defendant Samuel A. Kean, cannot have a fair and impartial trial in said cause on the ground that an odium attaches to the applicant and to his cause of defence, on account of local prejudice, and he therefore demands a change of venue of said cause from the county.

THOMAS J. WOOD.

Subscribed and sworn to before me this 18th day of May, 1895.

GEO. M. EDER, *Clerk.*

And afterwards, to wit: on May 21st, 1895, the same being the 26th judicial day of the April term, 1895, of the Lake circuit court, before the honorable judge aforesaid, the following further proceedings were by said court had and entered of record in said cause, to wit:—

* * * * * * *

40 Now again come the parties appearing and the defendant Henry B. Masen now files answer herein in these words (insert) and also files herein his cross-complaint against the plaintiff and the defendants Anna R. Kean and Samuel A. Kean, which cross-complaint is in these words, to wit: (insert) and the defendant Mrs. Henry B. Masen also files answer herein in these words (insert); and thereupon the court sustains the motion of the defendant Kean and orders the venue of this cause changed to Porter county and said defendant is given six days in which to perfect such change.

41 STATE OF INDIANA, } *ss*:
Lake County, }

I, George M. Eder, clerk of the Lake circuit court hereby certify that the above and foregoing is a full, true and complete copy of all the proceedings had and entered of record in said cause, as the same appear of record in my office.

[OFFICIAL SEAL.] Witness my hand and official seal this 24th day of May, 1895.

GEORGE M. EDER,
Clerk Lake Circuit Court.

42-46 Be it further remembered, that on Monday, July 1st, 1895, the same being the 1st judicial day of the adjourned May term 1895, of the Porter circuit court, held at the court-house in the city of Valparaiso, and before the Honorable John H. Gillett, regular judge thereof, the following proceedings were had and entered of record, in the following cause, to wit:

* * * * * * *

47 Now again come the parties heretofore appearing herein, and thereupon Henry B. Masen files answer and cross-complaint herein, in these words, to wit:

Answer of Mason.

STATE OF INDIANA, }
Lake County. }

Lake Circuit Court, April Term, 1895.

CALUMET CANAL & IMPROVEMENT COMPANY }
vs. }
CHARLES B. ALEXANDER ET AT. }

The defendant Henry B. Masen for answer to the plaintiff's complaint disclaims any interest in and to the lands mentioned in the plaintiff's complaint that are situated in sections sixteen (16) seventeen (17), twenty (20), twenty-one (21) twenty-two (22) twenty-seven (27), twenty-eight (28) thirty (30) thirty-three (33) thirty-four (34) and thirty-five (35) in township thirty-seven (37) north of range nine (9) west, and the northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) and the southeast quarter (S. E. ¼) of the southeast quarter (S. E. ¼) of section twenty-four (24) in said township and range.

The said defendant further disclaims any interest in or to all that part of section eighteen (18) township twenty-seven (27) north of range nine (9) west, which is east of the meander line of Lake George as shown by the survey of 1835, also all that part of section nineteen (19) east and south of the meander line of said lake as shown by said survey, also all that part of the south half of section twelve (12) township thirty-seven (37) north of range ten (10) west, east of the meander line of lake as shown by said survey, also all that part of the south half of section thirteen (13) township thirty-seven (37) north of range ten (10) west, which lies between the meander lines of said two lakes as shown by said survey; also all that part of the northwest quarter (N. W. ¼) of section twenty-four (42), township thirty-seven (37) north range ten (10) south of the meander line of said Wolf lake as shown by the said survey and also all that part of the northeast quarter (N. E. ¼) of said section twenty-four (24) in said township, thirty-seven (37) north of range

ten (10) west, that is south and east of the meander line of said Wolf lake and west of the meander line of said Lake George, as shown by said survey, and all of section eighteen (18) township thirty-
48 seven (37) north of range nine (9), which is east of the meander line of said Lake George, as shown by said survey and also all of section nineteen (19) in said last-named township and range, that is south and east of the meander line of said last-named lake.

And as to all the other lands mentioned in the plaintiff's complaint, the said defendant denies each and every allegation in the plaintiff's complaint.

Wherefore, the said defendant asks judgment.

49 *Cross-complaint of Mason.*

The defendant Henry B. Masen, by way of cross-complaint against the plaintiff and the defendant Annie R. Kean, and Samuel A. Kean, complains and says that he is the owner and entitled to the possession of the following-described lands located in Lake county, Indiana, and described as follows, to wit:—

Lote five (5), six (6), seven (7), eight (8), nine (9), ten (10) and the southwest quarter (S. W. ¼) of section twelve (12) in township thirty-seven (37), north of range ten (10) west; the north half of section thirteen (13); the southwest quarter (S. W. ¼) of section thirteen (13) and lots one, (1), three (3), four (4), five (5), six (6), seven (7) and eight (8). all in said section thirteen (13), in said township and range; and lots four (4), five (5), six (6), and seven (7), in section twenty-four (24) in said township and range; and also of the following lands in township thirty-seven (37), north of range nine (9) west, to wit;—Lots five, (5), six (6) seven (7) and eight (8), and the west half of section eighteen (18), and lots five (5) seven (7) eight (8), nine (9), ten (10), and eleven (11), in section nineteen (19), the said lands so owned being all the lands in said section within the meander lines of the said lakes as shown by the survey of 1835, and including lot one (1) in said section thirteen (13), as shown by said survey. That the plaintiff and the said defendants, Kean and Kean claim some interest and title in and to the said lands and lots adverse to the defendant Masen. That the claims of the said Kean and Kean and of the plaintiff serve to cast a cloud upon the title of the cross-complainant, although they are void and of no force and effect.

Wherefore the said Henry V. Masen asks that his title in and to the said lands be quieted in him and set at rest, and for all other relief proper and just.

McMAHAN & MEEKER,
Att'ys for Masen.

49½ And the defendants Samuel A. Kean and Annie R. Kean file answer and answer to cross-complaint herein, in these words, to wit:

STATE OF INDIANA, } ss:
County of Lake, }

Answer to Cross-complaint—Submission—Finding.

In the Porter Circuit Court, May Term, 1895.

CALUMET CANAL & IMPROVEMENT CO. }
vs.
CHARLES B. ALEXANDER ET AL. }

The defendants, the Keans, answer the cross-complaint of the Masons—Henry B. Mason—and denies each and every allegation therein contained.

FENNELL & WOOD,
Att'ys for the Kean & Kean.

And thereupon this cause is submitted to the court for trial without the intervention of a jury and the court having heard the evidence and being sufficiently advised in the premises finds for the defendant Samuel A. Kean and Anna R. Kean, that they are the owners in fee of the following-described real estate, to wit: The undivided half of the east half of the northwest quarter (N. W. ¼) and the undivided half of lots five (5), six (6), nine (9), ten (10) and eighteen (18) in township thirty-seven (37), range nine (9) west containing two hundred twenty-three acres in Lake county, Indiana, according to the Wolcott survey of 1874, and that their title thereto ought to be quieted and set at rest as against each and all of these defendants.

And the court does now find for the plaintiff that it is the owner in fee of the following-described real estate in township thirty-seven (37) range nine (9) west, in Lake county, Indiana, to wit: All of fractional section fifteen (15); lots one (1), two (2), three (3), five (5) six (6), seven (7), eight (8), in section sixteen (16), the same being all of said section except the west half of the northwest quarter (N. W. ¼) thereof; the northeast quarter (N. E. ¼) of the northeast quarter (N. E. ¼); the south half of the northeast quarter (N. E. ¼); the southeast quarter (S. E. ¼), the west half of the northwest quarter (N. W. ¼), the west half of the southwest quarter (S. W. ¼) and the southeast quarter (S. E. ¼) of the southwest quarter (S. W. ¼) of section seventeen (17); lots number three (3) and four (4) survey of 1835, of
50 section eighteen (18), the same being all of the south half of said section; lots number one (1), two (2), three (3) and four (4); the southeast quarter (S. E. ¼) of the northeast quarter (N. E. ¼) and the southeast quarter (S. E. ¼) survey of 1835, of section nineteen (19) the same being the whole of said section; the north half and the southeast quarter (S. E. ¼) of section twenty (20); all of section twenty-one (21); all of fractional section twenty-two (22); all of section twenty-seven (27); all of section twenty-eight (28); the northeast quarter (N. E. ¼), the north half of the northwest quarter (N. W. ¼), the north half of the southeast quarter (S. E. ¼), and the southeast quarter (S. E. ¼) of the southeast quarter (S. E. ¼) of section

thirty (30); all of section thirty-three (33) which lies north of the Calumet river; lot number four (4), and all of the fraction south of the river, of section thirty-five (35).

Also the plaintiff is the owner in fee and in possession of all the following real estate situate in township thirty-seven (37), north of range ten (10) west, in Lake county, Indiana, to wit:

Lots three (3) and four (4) survey 1834, of section twelve (12) the same being all of the south half of said section; lots one (1) and two (2) survey 1834, section thirteen (13) the same being the whole of said section; lots two (2) and three (3) and the northwest quarter of the southwest quarter and the southeast quarter of the southeast quarter, survey of 1834, of section twenty-four (24) the same being the whole of the north half of said section, and the northwest quarter of the southwest quarter and the southeast quarter of the southeast quarter of said section, excepting and reserving from said above descriptions the following tract lying, being and situate in sections twenty (20) twenty-one (21) and twenty-eight (28) to wit: Commencing at a point on the east line of the Indiana boulevard, where the center line of section twenty (20) in township thirty-seven (37) north of range nine (9) west intersects the same and running thence east along said center line to the quarter post on the east line of said section twenty (20); thence southeasterly in a straight line to the southeast corner of the north half of the northwest quarter of section twenty-eight (28) in township thirty-seven (37) range nine
51 (9) aforesaid; thence west on the south line of said north half of the northwest quarter of section twenty-eight (28) to the east line of said Indiana boulevard, thence northwesterly along the easterly line of said boulevard to the point or place of commencement, containing one hundred and sixty acres and that its title thereto ought to be quieted, and set at rest as against each and all of these defendants.

Judgment.

It is therefore considered adjudged and decreed by the court that the title of the defendants Samuel A. Kean, and Anna R. Kean in and to the real estate heretofore described and found to be theirs in fee herein be and the same is hereby forever quieted and set at rest as against each and all of their codefendants, and this plaintiff and their heirs and all persons claiming, by through or under them, and they are hereby restrained from asserting or setting *or setting* up any claim in or to said above-described real estate whatsover.

And it is further considered adjudged and decreed by the court that the title of the plaintiff in and to the real estate heretofore described herein and found to be its in fee-simple be and the same is hereby forever quieted and set at rest as against each and all of these defendants and their heirs and all persons claiming by through or under them and they are hereby enjoined and perpetually restrained from asserting or setting up any claims in or to said above-described real estate whatsoever.

And now said plaintiff files motion for a new trial herein, as of

right, as to the defendants Samuel A. and Anna R. Kean, and the same is in these words, to wit:

Motion for New Trial.

STATE OF INDIANA, } ss:
County of Porter, }

Circuit Court, May Term, 1895.

CALUMET CANAL & IMPROVEMENT COMPANY }
vs.
CHARLES B. ALEXANDER ET AL. }

The plaintiff moves the court for new trial in this action as of right as against Samuel A. Kean and Anna R. Kean, and tenders herewith its undertaking with William Johnston as surety conditioned as required by law.

WILLIAM JOHNSTON,
WILLIAM O. JOHNSON,
Att'ys for Plaintiffs.

52 We undertake that plaintiff in the above-entitled cause shall pay all costs and damages which shall be recovered against it herein.

CALUMET CANAL & IMPROVEMENT COMPANY,
By W. M. JOHNSTON.
WILLIAM JOHNSTON.

Examined and approved by me July 1st, 1895.
JOHN H. GILLETT, *Judge.*

and now tenders bond with William Johnston as surety thereon, which bond is approved by the court, and new trial as of right granted.

And now by agreement of plaintiff and the defendant Henry B. Masen, their controversy is to be heremafter settled in this cause, the same as though no judgment had been entered, and now Henry B. Masen files motion for new trial, as of right as to the defendants Samuel A. Kean and Anna R. Kean, which motion is in these words, to wit:

New Trial Granted.

STATE OF INDIANA, } ss:
County of Porter, }

Porter Circuit Court, May Term, 1895.

CALUMET CANAL & IMPROVEMENT COMPANY }
vs.
CHARLES B. ALEXANDER ET AL. }

The defendant and cross-complainant Henry B. Masen, moves the court for a new trial of this action as a matter of right, and tenders

herewith his undertaking with Willis C. McMahan, as surety as required by law.

HENRY B. MASEN,
By W. C. McMAHEN, *His Att'y.*

and which motion the court does now overrule, to which ruling of the court, the defendant Masen excepts and is given 120 days for bill of exceptions.

And now plaintiff asks and is granted rule on Masen to furnish abstract herein and defendant Masen now files motion in these words:

Motion & Bond of Mason for New Trial.

STATE OF INDIANA, } ss:
County of Porter, }

Porter Circuit Court, May Term, 1895.

CALUMET CANAL & IMPROVEMENT COMPANY }
vs. }
CHARLES B. ALEXANDER ET AL. }

53–58 The defendant and cross-complainant, Henry B. Masen, moves the court for a new trial of this action as a matter of right and tenders herewith his undertaking with Willis C. McMahan as surety, as required by law.

HENRY B. MASEN,
By W. C. McMAHAN,
His Attorney.

Bond.

STATE OF INDIANA, } ss:
County of Porter, }

Porter Circuit Court, May Term, 1895.

CALUMET CANAL & IMPROVEMENT COMPANY }
vs. }
CHARLES B. ALEXANDER ET AL. }

We undertake that the defendant Henry B. Masen, in the above-entitled cause shall pay all costs and damages, which shall be recovered against him therein.

HENRY B. MASEN,
By WILLIS C. McMAHAN,
His Attorney-in-fact.
WILLIS C. McMAHAN.

Approved July 1st, 1895.

JNO. H. GILLETT,
Judge Porter Circuit Court.

for new trial herein as of right, and now files bond with Willis C. McMahan, as surety thereon, which bond is approved by the

court, and a new trial as of right, is granted the said Henry B. Masen.

Be it further remembered, that on Tuesday, October 8th, 1895, the same being the second judicial day of the October term, 1895, of the Porter circuit court, held at the place and before the honorable judge aforesaid, the following further proceedings were had and entered of record, by said court, in the following cause, to wit:

* * * * * * *

59–65 Comes the plaintiff herein, by William O. Johnson and William Johnston, its attorneys and files its amended complaint, in these words:

* * * * * * *

66–72 making the following additional parties defendant in this cause, to wit:

* * * * * * *

73–77 And thereupon comes the defendant-, Henry B. Masen, Fay C. Masen, Annie R. Kean, Samuel A. Kean, Henry H. Felt, Sarah A. Smail, Orson B. Felt, and John Kreuter, and file their separate and several answer to the amended complaint herein in these words to wit:

* * * * * * *

78 *Answer to Amend. Comp.*

The defendants Anna R. Kean, Henry B. Masen, Samuel A. Kean, Sarah A. Smail, Orson Felt, Henry B. Felt and Charles Kreuter for a further answer to the plaintiff's complaint disclaim any interest in and to the lands mentioned in plaintiff's complaint that are situated in sections sixteen (16), seventeen (17), twenty (20), twenty-one (21), twenty-two (22), twenty-seven (27), twenty-eight (28), thirty (30), thirty-three (33), thirty-four (34), and thirty-five (35), in township thirty-seven (37) north of range nine (9) west, and as to those parts of sections twelve (12), thirteen (13), eighteen (18), nineteen

79–85 (19), and twenty-four (24), mentioned in said complaint which are east, south or west of the meander line of the beds of Wolf and George lakes.

And further answering these defendants deny each and every allegation contained in said complaint except as to the land above disclaimed.

And further answering these defendants say that the cause of action if any, did not accrue within fifteen years prior to the commencement of this suit.

And further answering these defendants say the cause of action if any, did not accrue within twenty (20) years prior to the commencement of this suit.

WILLIAM P. FENNELL,
THOS. J. WOOD,
Att'ys for said Defendants.

And the defendant Henry B. Masen files his cross-complaint against the plaintiff in these words, to wit:

Cross-complaint of Mason.

STATE OF INDIANA, } ss:
Lake County, }

Lake Circuit Court, April Term, 1895.

* * * * * * *

86–92 The defendant Henry B. Masen by way of cross-complaint against the plaintiff and the defendant Annie R. Kean and Samuel A. Kean complains and says that he is the owner and entitled to the possession of the following-described land located in Lake county, Indiana, and described as follows, to wit:—

Lots five (5), six (6), seven (7), eight (8), nine (9), ten (10), and the southwest quarter (S. W. ¼) of section twelve (12) in township thirty-seven, (37) north of range ten (10), west; the north half of section thirteen (13); the southwest quarter of section thirteen (13), and lots one (1), three (3) four (4), five (5), six (6), seven (7) and eight (8), all in said section thirteen (13), in said township and range; and lots four (4), five (5), and six (6) and seven (7) in section twenty-four (24) in said township and range; and also of the following lands in township thirty-seven (37) north of range nine (9), west to wit; lots five (5), six (6), seven (7), eight (8) nine (9), ten (10) and eleven (11) in section nineteen (19), the said lands so owned being all the lands in said section within the meander lines of the said lakes as shown by the survey of 1835, and including lots one (1) in said section thirteen (13) as shown by said survey.

That the plaintiff and said defendants Kean & Kean claim some interest and title in and to the said lands and lots adverse to the defendant Masen.

That the claims of the said Kean & Kean and of the plaintiff served to cast a cloud upon the title of the cross-complainant, although they are void and of no force and effect.

Wherefore, the said Henry B. Masen asks that his title in and to the said lands be quieted in him and set at rest, and for all other relief proper and just.

McMAHAN & MEEKER,
Att'ys for Masen.

* * * * * * *

93–98 And thereupon the plaintiff files answer to the cross-complaint of the defendant Henry B. Masen, which answer is in these words, to wit:

* * * * * * *

99–104 *Answer to Cross-comp.*

The plaintiff for answer to the cross-complaint of Henry B. Masen, denies each and every allegation therein contained.

W. O. JOHNSON,
WILLIAM JOHNSTON,
Att'ys for Pl'ff.

And thereupon on further motion of the plaintiff the depositions on file are ordered published.

Be it further remembered that on Monday November 4th, 1895, the same being the 25th judicial day of the October term, 1895, of the Porter circuit court, held at the place and before the hon. judge aforesaid, the following further proceedings were by said court had and entered of record in the above-entitled cause, to wit:

* * * * * * *

105–110 Now again come the parties heretofore appearing, by counsel, and the plaintiff now files reply to the answer of Annie R. Kean, Sarah A. Smail, Samuel A. Kean, Orson B. Felt, Henry H. Felt, and Charles Kreuter which reply is in these words, to wit:

Reply Filed.

111–117 Reply.

The plaintiff for reply to the answer of the defendants Annie R. Kean, Samuel A. Kean, Charles Kreuter, Sarah A. Smail, Orson B. Felt and Henry H. Felt denies each and every allegation therein contained.

W. O. JOHNSON,
WILLIAM JOHNSTON,
Att'ys for Pl'ff.

And thereupon the defendants Annie R. Kean, Samuel A. Kean, Sarah A. Smail, Orson B. Felt, Henry H. Felt, Charles Kreuter, and Henry B. Mason file their separate and several motion- in these words, to wit:

STATE OF INDIANA, } ss:
County of Porter, }

Porter Circuit Court, October Term, 1895.

* * * * * * *

118 The defendants Annie R. Kean, Samuel A. Kean, Orson Felt, Henry B. Felt, Sarah Smail, Charles Kreueter, and Henry B. Masen, separately and severally and each for himself moves the court to strike out and suppress separately and severally from the deposition of Jacob Forsyth the following questions, answers and parts of answers separately and severally considered as follows:

Motion to Strike Out Parts of Deposition.

Question four and answer.
Question five and answer.
Question six and answer.
Question seven and answer.
Question eight and answer.
Question nine and answer.

Question eleven and answer.
Question twelve and answer.
Question fifteen and answer.
Question sixteen and answer.
Question eighteen and answer.
Question twenty and answer.
Question twenty-two and answer.
Question twenty-five and answer.
Question twenty-nine and answer, and
Question four on page nine and the answer thereto, and
Question five and answer thereto on page No. nine.

For the reason that the said questions and each of them call for the conclusion of the witness; and are immaterial and irrelevant to prove any of the issues of the case and for the reason that they and each of them seek to prove the payment of taxes by oral evidence.

And for the further reason that the records are the best evidence of the facts to each of said questions.

And they seek to prove title to land by oral evidence and because the record is the best evidence.

W. C. McMAHAN,
Att'y for Masen.
W. P. FENNELL AND
THOS. J. WOOD,
For Defendants Anna R. Kean, Samuel A. Kean, Orson Felt, Henry B. Felt, Sarah A. Smail, and Charles Kreuter.

119–125 To strike out parts of the deposition of Jacob Forsyth, whereupon counsel for the plaintiff states and agrees that plaintiff will not claim anything for the evidence of said Forsyth in so far as his deposition tends to prove title by parol evidence.

Whereupon a jury is waived and this cause is submitted to the court for trial.

Be it further remembered that on Tuesday November 5th, 1895, the same being the 26th judicial day of the October term, 1895, of the Porter circuit court, held at the place and before the honorable judge aforesaid, the following proceedings were by said court had and entered of record in said cause, to wit:

* * * * * * *

126–132 *Ruling on Motion to Suppress.*

Now again comes the plaintiff, and come also defendants and cross-complainant heretofore appearing, and the motion of the defendant so appearing, to suppress part of the deposition of the witness Jacob Forsyth, is sustained as to question four (4) on page nine (9), and the answer thereto, and their motion as to the remainder of the deposition is overruled, to which ruling of the court, the said defendants and cross-complainant severally except.

Finding of Court.

And the court having heard the remainder of the evidence in this cause, and the arguments of counsel, and being sufficiently advised in the premises, does now find for the plaintiff, against all the defendants and cross-complainant, that all the allegations of its complaint are true; that it is the owner in fee-simple of the real estate described in the complaint; that the defendants claim an interest therein adverse to the plaintiff; that their claim is without right, is unfounded, and is a cloud upon its title, and the plaintiff is entitled to have its title to said lands quieted as well against the cross-complainant as the defendants.

Thereupon the defendants Annie R. Kean, Samuel A. Kean, Orson B. Felt, Henry H. Felt, Sarah A. Smail, and Charles Kreuter, separately and severally file motion for a new trial, which several motions are overruled by the court, to which ruling of the court the said several defendants except, and which said motion is in these words, to wit:

* * * * * * *

133–139 *Motion for a New Trial.*

The defendants named in the said cause, to wit—Annie R. Kean, Samuel A. Kean, Orson B. Felt, Henry B. Felt, Sarah A. Smail, and Charles Kreuter, severally move the court for a new trial in the said cause, on these grounds to wit:

First. That the finding of the court is contrary to law.

Second. That the finding of the court is contrary to the evidence.

WILLIAM P. FENNELL,
THOS. J. WOOD,
Att'ys for said Def'ts.

Thereupon the defendant and cross-complainant Henry B. Masen, files motion for a new trial, in these words, to wit:

STATE OF INDIANA, } ss:
County of Porter, }

Porter Circuit Court, October Term, 1895.

* * * * * * *

140 *Mason's Motion for New Trial.*

Henry B. Masen moves the court for a new trial of this cause for the following reasons:

First. That the court erred in admitting in evidence over the objection and exception of the defendant Masen, the copy of the plat of township thirty-seven (37) north of range ten (10) west, introduced by plaintiff.

Second. That the court erred in admitting in evidence, over the objection and exception of the defendant Henry B. Masen, the copy of the field-notes of the survey introduced by the plaintiff for township thirty-seven (37) north of range ten (10) west.

Third. The court erred in admitting in evidence over the objection of the said Masen, the patent from the United States to the State of Indiana, dated March 24, 1853, in so far as the same pertains to sections twelve, (12) and thirteen (13) township thirty-seven (37) north of range ten (10) west.

Fourth. The court erred in admitting in evidence the patent from the State of Indiana to George W. Clark, dated June 11, 1856, for lot No. three (3) of the southeast quarter (S. E. ¼) of section twelve (12) township thirty-seven (37) north of range ten (10) west.

Fifth. The court erred in admitting in evidence, over the objection of the defendant Masen, the patent from the State of Indiana, to George W. Clarke, dated June 11, 1856, conveying lot one (1) of the northeast quarter, (N. E. ¼) of section thirteen (13) township thirteen (13) north of range ten (10) west.

Sixth. The finding of the court is contrary to the law.

Seventh. The finding of the court is contrary to the evidence.

Eighth. The judgment of the court is contrary to the law.

Ninth. The judgment of the court is contrary to the evidence.

W. C. McMAHAN,
Att'y for Henry B. Masen.

141 Which motion is likewise overruled by the court to which ruling of the court the defendant Henry B. Masen, excepts, and one hundred and twenty (120) days is given to each of said defendants so moving for a new trial to make and file his, her and their bill of exceptions.

Final Judgment.

It is therefore considered and adjudged by the court that the cross-complainant Henry B. Masen take nothing by his cross-complaint, and that the plaintiff is the owner in fee-simple of the real estate described in its complaint and situate in the county of Lake and State of Indiana, to wit.

All of the following-described real estate situate in township thirty-seven (37) north of range ten (10) west, in Lake county, Indiana, to wit: Lots three (3) and four (4) in section twelve (12), survey of 1834, the same being all of the south half of said section; lots one (1) and two (2) in section thirteen (13) survey of 1834, the same being all of said section; lots two (2) and three (3) the same being all of the north half of section twenty-four (24) township thirty-seven (37) north of range ten (10) west; the northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼); the southeast quarter (S. E. ¼) of the southeast quarter (S. E. ¼), all in section twenty-four (24) survey of 1834.

Also all of factional section fifteen (15); lots number one (1) two (2), three (3), five (5) six (6) seven (7) and eight (8) in section sixteen (16); the northeast quarter (N. E. ¼) of the northeast quarter (N. E. ¼) the south half (S. ½) of the northeast quarter (N. E. ¼); the southeast quarter (S. E. ¼) and the west half of the northwest quarter (N. W. ¼); the west half of the southwest quarter (S. W. ¼) and the southeast quarter (S. E. ¼) of the southwest quarter (S. W. ¼) all in

section seventeen (17); lots number three (3) four (4), survey of 1835, in section eighteen (18) the same being the whole of the south half of said section; lots number one (1) two (2), three (3) and four (4) and the southeast quarter (S. E. ¼) of the northeast quarter (N. E. ¼) and the southeast quarter (S. E. ¼) survey of 1835, all in section nineteen (19), the same being the whole of said section nineteen (19); the north half and the southeast quarter (S. E. ¼) of section twenty (20); and all of section twenty-one (21); all of fractional section twenty-two (22); all of section
142 twenty-seven (27); all of section twenty-eight (28); the northeast quarter (N. E. ¼); the north half of the northwest quarter (N. W. ¼) the north half of the southeast quarter (S. E. ¼) and the southeast quarter (S. E. ¼) of the southeast quarter (S. E. ¼) all in section thirty (30); all of section thirty-three (33) which lies north of the Calumet river; all of section thirty-four (34) which lies north of the Calumet river; lot four (4) and the fraction south of river in section thirty-five (35), all in township thirty-seven (37) north of range nine (9) west, excepting and reserving the following-described tract; commencing at a point on the east line of the Indiana boulevard where the center line of section twenty (20) in township thirty-seven (37) north of range nine (9) west intersects the same and running thence east along the said center line to the quarter post on the east line of said section, thence southeasterly in a straight line to the southeast corner of the north half of the northwest quarter (N. W. ¼) of section twenty-eight (28) in township thirty-seven (37) range nine (9) thence west on the south line of said north half of the northwest quarter (N. W. ¼) of section twenty-eight (28), to the east line of said Indiana boulevard, thence northwesterly along the easterly line of said boulevard to the place of beginning, said exception containing one hundred and sixty (160) acres.

That all of the defendants' and the cross-complainant Henry B. Masen'- claims thereto and therein are without right and unfounded and that plaintiff's title thereto be and the same is hereby quieted as against each and all of them.

It is further adjudged that the plaintiff recover its costs and charges herein laid out and expended, of and from the defendants Annie R. Kean, Samuel A. Kean, Henry B. Masen, Fay C. Masen, Sarah A. Smail, *Cah*rles Kreuter, Orson B. Felt and Henry H. Felt.

And the defendants and each of them are further hereby ordered by the court to make deed for all of said premises to the plaintiff. And now they and each of them having failed to execute said deed, William Johnston, is hereby appointed a commissioner to convey said real estate to plaintiff, which deed when executed by him shall vest in the plaintiff all the right, title and interest of the defendants and each of them in and to said real estate and every part thereof.

143 And now comes William Johnston, the commissioner heretofore appointed and reports to court that he has made deed to said plaintiff for all of said lands above named in accordance with the decree of this court, and thereupon the court examines said deed and approves the same and notes its approval on the

margin thereof, which deed is in the words and figures as follows (insert).

144 *Longhand Manuscript Filed.*

STATE OF INDIANA, } ss:
County of Porter, }

CALUMET CANAL & IMPROVEMENT COMPANY }
vs.
CHARLES B. ALEXANDER ET AL. }

Be it remembered that heretofore, to wit, on the 22nd day of February, 1896, Steven P. Corboy, the reporter, who took the evidence in the said cause filed in the office of the clerk of the Porter circuit court his longhand manuscript of the said evidence which said longhand manuscript was afterwards encorporated into the bill of exceptions hereinafter set forth.

145 *Filing of Bill of Exceptions.*

CALUMET CANAL & IMPROVEMENT COMPANY }
vs.
CHARLES B. ALEXANDER ET AL. }

Be it remembered that heretofore, to wit:—on the 7th day of October, 1896, the following bill of exceptions of the above-entitled cause was filed in the office of the clerk of the Porter circuit court and is in the words and figures as follows to wit.:

146 *Reporter's Certificate.*

STATE OF INDIANA, } ss:
Porter County, }

In the Porter Circuit Court, October Term, 1895.

CALUMET CANAL & IMPROVEMENT COMPANY }
vs.
CHARLES B. ALEXANDER ET AL. }

Bill of exceptions.

Be it remembered that on the trial of said cause Stephen P. Carboy was employed by the parties thereto to make a verbatim report in shorthand of the evidence in said cause and upon their motion the court administered an oath to the said Stephen P. Carboy, as required by law, requiring him to make a fair and impartial report of all the evidence in said cause and the said reporter was directed by the court to and did take down in shorthand all the evidence given in said cause and noted the proceedings of court in respect to the admission or rejection of evidence and the objections and exceptions of counsel respecitively thereto, and all the said evidence so given with the rulings of the court and objections and exceptions of

counsel appear and are fully set forth in the said reporter's longhand report of the same, which is filed herewith and attached hereto and made a part of this bill of exceptions, and the same is in the words following, to wit:

147 *Stenographer's Longhand Report of Evidence.*

STATE OF INDIANA, } ss:
Porter County, }

In the Porter Circuit Court, to the October Term, 1895.

CALUMET CANAL AND IMPROVEMENT COMPANY }
vs. }
CHARLES B. ALEXANDER ET AL. }

Reporter's certificate.

Be it remembered that on the — judicial day of the October term, 1895, of the Porter circuit court, the same being the — day of November, 1895, Stephen P. Corboy was employed by the parties hereto to make a verbatim report of the evidence in said cause and upon their motion the said Stephen P. Corboy was sworn by the court to make a fair and impartial report of the evidence in said cause and he was there directed by the court to and did correctly take down in shorthand the evidence given in said cause and did correctly note the proceedings of court in respect to the admission or rejection of evidence and the objections and exceptions of counsel respectively thereto; and said reporter has, at the request of the said defendants Annie R. Kean and Henry B. Mason, transcribed his shorthand notes, taken as aforesaid, into longhand and the longhand manuscript of the said shorthand notes taken on the trial of said cause, as aforesaid, is as follows:

148 And the plaintiff, in order to sustain the issues on his behalf introduced the following evidence:

Plats Offered in Evidence.

Mr. JOHNSTON: The first evidence we desire to offer is the Government survey and field-notes and plats. I first offer plat of township 37, range 9.

Objection to Plats.

Mr. MCMAHAN: On behalf of the defendant Mason I object to the introduction of the plat in so far as it affects sections 12, 13 and 24. I don't object to the one in range 10.

Mr. JOHNSTON: It is range 9 you don't object to.

Mr. MCMAHAN: It is range 10 I want to object to.

Mr. JOHNSTON: We offer in evidence plat of township 37 range 10.

Mr. MCMAHAN: On behalf of the defendant Henry B. Masen I object in so far as sections 12, 13 and 24 are concerned for the reason

that the land is unsurveyed; the land was not surveyed. There is no survey from which a plat could be made; and for the further reason that it is not a certified copy of an original record, but it is a certified copy of a copy; and for the further reason that the surveyor is not the proper custodian of the record.

Mr. JOHNSTON: If the objection is made I will offer another plat, your honor.

Mr. MCMAHAN: There are no field-notes with it.

Mr. JOHNSTON: There are field-notes attached to it.

Mr. FENNELL: I object on behalf of defendant Kean for the reason it does not purport to be a copy. It is a copy of the field-notes; it does not certify that it is a copy of the plat.

COURT: Let me see the papers. I cannot tell without an inspection of those papers what they do purport.

(The papers were handed to the court.)

Mr. JOHNSTON: I now offer in evidence this plat—certified to by George W. Fisher.

Mr. FENNELL: I object to that. It is not certified to by the proper officer.

Mr. JOHNSTON: All objections to the introduction of our field-notes and plats are withdrawn and they go in evidence. All objections to this map here, they have waived in so far as the certificates are concerned.

149 *Obj. to Plats.*

Mr. MCMAHAN: In so far as the legality of both plats are concerned that is still a question. My objection is to remain to the plat. It shows on its face that the land is unsurveyed.

Mr. JOHNSTON: I introduce these plat and field-notes in evidence.

The plats and field-notes were marked as Exhibits A, B, C, and D, and G, were respectively introduced and read in evidence and are as follows:

(Here follows map marked page 150.)

151 & 152 EXHIBIT B.

Field-notes.

T. 37 N., R. 10 W., 2nd mer., Inda.

South boundary—var., 6 d. 10′ E.

West. On S. boundary of sec. 36.
40.00 Set qr. sec. post from which
A. Y. oak 10 in. dia. brs. N. 52 E. 42 lks. &
A. Y. " 14 in. dia. brs. N. 23 W. 67 lks.
67.28 to State line 1,870 lks. S. of 153 r. mile post and set post from which
A. W. oak 9 in. dia. brs. N. 29 E. 115 lks.
A. W. oak 10 in. dia. brs. N. 59 E. 160 lks.
Land level and poor, timber oak.

FOLD OUT IS TOO LARGE TO BE FILMED

East boundary—var., 6 d. 25 E.

North. On east boundary of sec. 36
40.00 Set *or.* sec. post from which
a W. oak 10 in. dia. brs. S. 29 W. 97 lks. &
A. Y. oak 10 in. dia. brs. N. 6½ W. 28 lks.
52.86 Set post on right hand of Grand Calumic
R. crs. S. E. from which
A. Y. oak 24 in. dia. brs. S. 49 E. 87 lks. &
A. Y. oak 10 in. dia. brs. S. 77 W. 123 lks.
68.94 Set post on left bank of river from which
A. Y. oak 12 in. dia. brs. N. 71 E. 251 lks. &
A. Y. oak, 18 in. dia. brs. N. 55 E. 258 lks.
80.00 Set post cor. to secs. 25 & 36 from which
A. W. oak 12 in. dia. brs. S. 31 W. 41 lks. &
A. W. oak, 14 in. dia. brs. N. 25 W. 46 lks.
Land level and poor, timber oak, marsh about stream.
153

North. On E. boundary of section 25.
40.00 Set qr. sec. post from which
A. Y. oak 9 in. dia. brs. S. 6 W. 295 lks. &
A. Y. oak 12 in. dia. brs. N. 16 W. 73 lks.
58.19 A. W. oak 12 in.
80.00 Set post cor. to secs. 24 & 25 from which
A. Y. oak 18 in. dia. brs. S. 5 W. 192 lks. &
A. Y. oak 9 in. dia. brs. S. 60 W. 124 lks.
Land gently rolling; soil poor; timber oak.
North. On E. boundary of section 24
19.00 Enter marsh.
24.50 Set post on S. margin of lake from which
A. W. oak 10 in. dia. brs. W. 790 lks. & no other
40.00 *Or.* sec. post in lake
80.00 Cor. to secs. 13 & 24 in lake
Land &c. same S. of lake.
North. On E. boundary of sec. 13
40.00 *Or.* sec. post in lake
80.00 Cor. to sec. 12 & 13 in lake—all lake
North. On E. boundary of sec. 12
30.95 Set post on N. margin of lake from wh.
a mayple 3 in. dia. brs. N. 26 E. 21 lks. &
a lynn 6 in. dia. brs. N. 61 W. 17 lks.
40.00 Qr. sec. post in deep water
80.00 Set post cor. to secs. 1 & 12 from which
A. Y. oak 6 in. dia. brs. N. 62½ E. 720 and no other. Land level and marshy about lake, Timber a few oaks (scattering) in places.
North. On E. boundary of section 1
35.00 Leave wet prairie.
40.00 Set *or.* section post from which
A. Y. oak 9 in. dia. brs. N. 17 W. 4 lks. &
A. Y. oak 12 in. dia. brs. S. 7 W. 211 lks.

154 *Field-notes, Old Survey.*

T. 37 N., R. 10 W., 2nd mer., Indiana.

76.25 Set post on margin of Lake Michigan.
A. Y. oak 10 in. dia. brs. N. 53 W. 58 lks. &
A. W. oak 18 in. dia. brs. S. 9 E. 82 lks.
Land level and poor, S. ½ mostly wet prairie.
N. ½ sandy, timber oak—M'ch 4, 1834.

North boundary—var., 6 d. 10′ E.

West. On S. boundary of sec. 36, T. 38 N. R. 10 W.
Began in border of Lake Michigan, 3.75 lks. N. and
396 lks. W. from where meander post is set
On east boundary of sec. 1 T. 36 N. R. 10 W.
On Lake Michigan.
Set at beginning from which A. Y. oak 14 in. dia. brs. S.
49 E. 196 lks. and no other.
10.31 Set post on margin of small lake
An aspen 9 in. dia. brs. N. 18 E. 140 lks. &
and aspen 9 in. dia. brs. S. 29 E. 41 lks.
21.30 Set post on W. side of lake from which
A. Y. oak 9 in. dia. brs. N. 86 E. 413 lks.
a willow 3 in. dia. brs. S. 80 E. 127 lks.
47.00 Leave marsh.
55.00 Enter marsh.
65.50 To State line & set post 28.57 lks. S. of
159 mile post in deep water.
No mound, land flat and poor, timber oak, &c.
SYLVESTER SIBLEY, *W. S.*

T. 37 N., R. 10 W., 2nd mer., Indiana.

Subdivision—var. 6 d. 25′ E.

West. Between secs. 25 & 36.
10.00 Intersects Claumic marsh.
37.50 To left bank of river and set post.
A. W. oak 20 in. dia. brs. N. ½ E. 270 & no other.
38.50 To main channel of river.

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40.00 Set qr. sec. post in river
41.00 Over river
51.00 Set meander post on right bank of lake of
river from which
A. W. oak 12 in. dia. brs. S. 4 W. 203 lks. &
68.12 To State line and set post from which
A. W. oak 30 in. dia. brs. N. 2½ E. 209 lks. and no other.
East ½ poor barren W. ½ & W. of river W. oak openings.
West. Between secs. 24 & 25
24.77 An elm 6 in. dia.

40.00 Set qr. sec. post from which
A. Y. oak 4 in. dia. brs. N. 53 N. 18 lks. &
A. Y. oak 4 in. dia. brs. S. 74 E. 9 lks.
67.00 To State line 21.23 lks. S. of 155th mile post
Set post cors. to secs. 24 & 25 from which
A. W. oak 12 in. dia. brs. S. 26 E. 58 lks. &
A. W. oak 12 in. dia. brs. N. 65 E. 55 lks.
E. ½ thick timber W. oak, lynn, poplar W. walnut elm &c. W. ½ marsh & barren 2nd-rate soil.
West. Between secs. 13 & 24
18.36 Leave lake in marsh and set post
No mound or bearings
23.36 Across marsh, intersects lake and set meander.
Post no bearings.
Space between these lakes marsh and beaver dam.

FEB. 19, 1836.

North. Between secs. 12 & 13 from cor. S secs. 12 & 13 & set meander post.
18.25 To lake of State line & set post
A sycamore 6 in. dia. brs. S. 35 E. 45 lks.
West. Between secs. 1 & 12
20.00 To lake and set meander post, no bearings
51.00 Over and set post in marsh " "
66.58 To State line and set post in marsh.

156 Meanders of lake on State line from post on N. boundary, thence on west side.

Courses.	Chs. Lks.	Remark.
S. 14 W.	50.00	In section 1
S. 51 W.	15.00	
S. 33 W.	10.00	
S. 38 W.	5.00	
S. 16 W.	10.19	To post in line between secs. 1 & 12
S. 15 W.	13.00	In sec. 12
S. 41 W.	20.52	To ash meander post in State line thence from post on State line at S. end of lake & on E. side
S. 72 E.	20.00	In sec. 24
N. 72 E.	20.00	
N. 21 E.	15.40	To line between secs. 13 & 24
N. 16 E.	25.00	In sec. 13
N. 6. W.	53.00	
N. 36½ E.	3.75	Line between secs. 12 & 13
N. 1½ W.	80.25	In sec. 12 & to line between sec. 1 & 12
N. 41 W.	16.00	In sec. 1
N. 25 E.	32.00	
North	15.00	
N. 28 E.	13.00	
N. 5 E.	12.50	To N. boundary.

157 Meanders of lake on range line commencing at post cors. to secs. 12 & 13 at N. end of lake, thence along W. margin.

Courses.	Chs. Lks.	Remarks.
S. 8 W.	45.00	In sec. 13
S. 24 W.	26.00	
S. 4 W.	11.55	Line between sections 13 & 24
S. 14 E.	48.00	In section 24
S. 45 E.	9.30	To range line at S. end of lake

Meanders of Lake Michigan from post on N. boundary at N. E. cor. of township.

S. 38 E.	5.00	To post on range line in sec. 1

Meanders of Grand Calumic river omitted.

GEO. W. T.

The foregoing field-notes are truly copied from the maps. Original scraps.

SAMUEL MORRISON.

158 *Field-notes, Old Survey.*

STATE OF INDIANA, }
Lake County. }

OFFICE OF COUNTY SURVEYOR.

I do hereby certify that the foregoing is a full, true and complete copy of the Government field-notes for township No. 37 N. range 10 west of 2nd meridian Ind. (exceptions noted) as the same appears from the copy of same on file in my office and of which I am the legal custodian.

[SEAL.]

GEO. W. FISHER,
Co. Surveyor of Lake County, Ind.

(Here follows map marked page 159.)

160 & 161 EXHIBIT "D."

Field-notes.

Township 37 N., R. 9 W., 2nd mer., Ind.

West boundary.

North. On E. boundary of sec. 25 T. 37 N. R. 10 W.
40.00 Set qr. sec. post from which
A. Y. oak 9 in. dia. brs. S. 6 W. 295 chs. &
A. Y. " 12 in. dia. brs. N. 16 W. 73 "
58.19 A. W. " 12 " "
80.00 Set posts cor. to secs. 24 & 25 from which
A. Y. oak 18 in. dia. brs. S. 5 W. 192 chs. &
A. Y. oak 9 in. dia. brs. S. 60 W. 124 chs.
Land gently rolling, soil poor, timber oak.

No. 47
Kean
v.
Canal Co

FOLD OUT IS TOO LARGE TO BE FILMED

Land in long lake very deep.

North. On E. boundary of sec. 24 T. 37 N. R. 10 W.
19.00 Enter marsh.
24.50 Set post on S. margin of lake from which
A. W. oak 10 in. dia. brs. W. 790 lks. No. other.
40.00 Or. sec. cor. in lake.
80.00 Cor. to secs. 13 & 24 in lake.
Land & C. much the same S. of lake.
North. On E. boundary of sec. 13 T. 37 N. R. 10 W.
40.00 Or sec. post in lake.
80.00 Cor. to secs. 12 and 13 in lake.
Land all lake.
North. On E. boundary of sec. 12 T. 37 N. R. 10 W.
30.95 Set post on N. margin of lake from which
a maple 3 in. dia. brs. N. 26 E. 21 lks. &
a lynn 6 " " " N. 61 W. 12 "

162

Tp. 37 N., R. 9 W., 2nd mer., Ind.

40.00 Qr. post cor. to secs. 1 & 12 from which
A. Y. oak 6 in. dia. brs. N. 62½ E. 720 lks. and no other
Land level & mostly marsh about lake. Timber scattering oak &c.

Subdivision.

West. On random between 19 & 30.
75.25 To W. boundary 246 lks. N. of post
All lake & marsh except 4 chs. on W. end.
East. Corrected between secs. 19 & 30.
35.55 Set qr. sec. post in lake.
75.55 Sec. cor.
North. Between secs. 19 & 20.
40.00 Set qr. sec. post in marsh from which
a birch 6 in. dia. brs. S. 10 E. 54 lks. &
a " 8 " " " N. 3 W. 25 "
80.00 Set post cor. to secs. 18, 18, 19 & 20 from which
a birch 10 in. dia. brs. S. 8 E. 39 lks. &
q " 10 " " " N. 27 E. 27 "
Lake and marsh under water.
West. Between secs. 18 & 19.
22.50 To long lake & set post from which
a birch 4 in. dia. brs. N. 56 E. 41 lks. & no other.
The entire line is marsh or lake. Jan. 27th 1835.

163

Tp. 37 N., R. 9 W., 2nd mer., Ind.

North. Between secs. 17 & 18.
40.00 Set qr. post in lake very deep water.
78.00 Enter barrens.
80.00 Set post cors. to secs. 7, 8, 17 & 18 in a point of barrens from which
A. Y. oak 5 in. dia. S. 58 E. 53 lks. &
A. W. " 14 " " N. 57 W. 96 "
Land in long lake very deep.

West.		Between secs. 7 & 18.
2.00		Enter marsh under water.
35.00		To lake and set post in marsh & water.
		No mound or bearings. Land all marsh and under water.

Meanders of small lake beginning at meander post in W. boundary, thence along E. end of lake.

S. 74 E.	13.00	In sec. 19
N. 38 E.	55.00	
N. 15 E.	13.00	
N. 35½ E.	7.00	Line between secs. 18 & 19.
N. & W.	55.00	In sec. 18.
N. 11 E.	22.00	
West	5.00	
N. 64 W.	9.70	Line between secs. 7 & 18.
N. 23 E.	25.00	In sec. 7.
N. 60 W.	19.00	
S. 56 W.	19.00	
S. 39 W.	28.40	To post on W. boundary at N. end of lake.

ANDREW BURNSIDE, *Dept. Sur.*

Jan. 30, 1835.
No certifi-ate.

164 I do hereby certify that the above and foregoing is full, true, & complete copy of the Government field-notes of tp. 37, N. range 9 W. 2nd mer. Ind. as regards secs. 18 and 19 in said township, as the same appears on the record in my office and of which I am the legal custodian.

GEO. W. FISHER,
Co. Surv. of Lake Co., Indiana.

June 13, 1895.

[SEAL.]

(Here follows map marked p. 165.)

166 & 167 Mr. JOHNSON: I next offer in evidence stipulations between the parties.

The stipulations were marked Exhibits "A" and "B" and were read in evidence, and the same are in the words and figures following, to wit:

FOLD OUT IS TOO LARGE TO BE FILMED

copie

And in case of appeal to the Supreme Court the entries in said

EXHIBITS "A" AND "B."

168 EXHIBIT A.

Stipulation to Use Abstract of Title in Evidence.

Agreement.

Lake Circuit Court, April Term, 1895.

Taken on change to Porter county.

CALUMET CANAL & IMPROVEMENT COMPANY
vs.
CHARLES B. ALEXANDER, HENRY B. MASON, MRS. HENRY B. Mason, *Amma* R. Kean, Samuel A. Kean.

It is hereby agreed between the parties appearing to this action that the entries in the abstract of the plaintiff and the entries in the abstract of defendants or any continuance thereof, shall at the trial of this cause be taken as evidence of the title of the parties the same as if the original instrument of conveyance patents, judgments and certified copies thereof were introduced in evidence.

Crown Point, May 21, 1895.

WILLIAM JOHNSON,
Pl'ff's Att'y.
THOS. J. WOOD,
Att'y for Kean & Kean.
W. C. McMAHAN,
Att'y for Mason & Mason.

169 EXHIBIT B.

Agreement.

STATE OF INDIANA, } ss:
County of Porter, }

In the Porter Circuit Court, October Term, 1895.

CALUMET CANAL AND IMPROVEMENT COMPANY
vs.
CHARLES B. ALEXANDER ET AL.

It is hereby agreed between the plaintiff and the defendants represented by W. P. Fennell that the entries in the abstract of plaintiff and the entries in the abstract of defendants or any continuation of said abstracts shall at the trial of this cause be taken as evidence of the title of the parties to the land in controversy the same as if the original instruments of conveyance, patents, judgments, certified copies thereof and proof of heirship were introduced in evidence. And in case of appeal to the Supreme Court the entries in said

abstract may be taken as and for the original instruments referred to or certified copies thereof.

Valparaiso, Ind., Sept. 26, 1895.

WILLIAM O. JOHNSON,
WILLIAM JOHNSTON,
Att'ys for Pl'ff.
WILLIAM P. FENNELL.

On behalf of defendant Henry B. Mason, I hereby agree and consent to the above.

W. C. McMAHAN,
Att'y for Mason.

170 *Special Entries in Abstract of Plaintiff.*

Mr. JOHNSTON: I next offer in evidence an entry from our abstract. United States to State of Indiana. Letters patent, dated March 24, 1853, grants and conveys whole of sections 15 and 17 etc. sections 12, 13, and 24, all in township 37, N. R. 10 W. with other lands.

Patent U. S. to State of Indiana.

Mr. McMAHAN: The defendant Mason objects to the introduction of the letters patent in evidence for the reason that it affects sections 12, 13 and 24 in range 10—for the reason that the land at the time was unsurveyed and the Government could not sell any unsurveyed land.

The court overruled the objection and permitted the entry concerning letters patent to be read in evidence, to which ruling of the court the defendant Mason at the time excepted.

And thereupon the entry from the abstract in relation to the letters patent was read in evidence and the same is in the words and figures following:

Patent.

United States
to
State of Indiana.

Letters patent, dated March 24, 1853, grants and conveys the whole of sections 15 and 17; the whole of fractional sections 18 and 19; the whole of sections 20, 21 and 22; the whole of sections 27, 28 and 29; the whole of fractional sections 12, 13 and 24, all in T. 37 N. R. 10 W. (with other lands) in the Winnamac Ind. land district according to the official plats of survey of the said lands returned to the General Land Office by the surveyor general, made in accordance with the act of Congress approved Sept. 28, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits." Sets forth that said lands have been selected as "swamp and overflowed lands" enuring to the said State under the act aforesaid, and for which the gov-

ernor of said State of Indiana did, on Dec. 18, 1852, request a patent to be issued to the said State. On file in auditor of State's office.

171-251 *State of Indiana to Geo. W. Clark.*

Mr. JOHNSTON: I next offer in evidence entry 110 of our abstract, certificate of purchase—State of Indiana, by Janna S. Holton, to George W. Clark.

COURT: Cannot you stipulate that you put in the abstract in evidence and either side shall be at liberty to put in so much of it as they want in evidence. Either side can insist when the record is made up to put in any entry he wants to.

Mr. MCMAHAN: There are one or two deeds I want to object to.

COURT: If you have any objection to any conveyance in the abstract you will raise it by specific objection. The abstract will be treated in evidence.

And thereupon the abstract was read in evidence and the same is hereto annexed and — a part hereof and is as follows, to wit:—

* * * * * * *

252 *Offer Entries 436 to 444 of Abstract.*

Mr. JOHNSTON: I want to introduce specifically entries 436 to 444 inclusive of the abstract. And the first statement of entry No. 7 and the first statement of entry No. 6.

The entries were read in evidence and are as follows:

253 (*Entry No. 6.*)

Additional tax sales.

Tax-sale entry 436.

20 acres of N. W. ¼, N. W. ¼, sec. 30, T. 37, R. 9,—40 acres, sold Jan'y 7, 1856, to G. W. Lawrence, for $1.69, amount of taxes returned delinquent in name of Henry Obenauer for 1854 and 1855.

Entry 437.

S. W. ¼, N. E. ¼, sec. 30, T. 37, R. 9,—40 acres, sold Jan'y 2, 1860, to George Earle & Son, for $2.50, amount of taxes returned delinquent in name of Henry Brooks for 1858 and 1859.

Entry 438.

E. ½, N. W. ¼, sec. 30, T. 37, R. 9,—80 acres, sold Feb'y 2, 1863, to E. W. Hohman for $5.43, amount of taxes returned delinquent in name of H. G. Loomis & D. Hess for 1861 and 1862. The record says, in pencil, "Sale an error; the del. tax was paid from del. list."

Entry 439.

S. W. ¼, N. E. ¼, sec. 28, T. 37, R. 9,—40 acres, sold Feb'y 1, 1864, to Janna S. Holton, for $2.62, amount of taxes returned delinquent

in name of Law, Schwartz & Co., for 1862 and 1863. Certificate dated March 7, 1864. The record says in pencil, "Hohman says the del. tax is paid."

Entry 440.

Frac. N. E. ¼ & E. ½ S. E. ¼, sec. 16, T. 37, R. 9,—167 acres, sold Feb'y 5, 1866, to Amos Allman, for $50.25, amount of taxes returned delinquent in name of George W. Clarke for 1864 & 1865. Certificate dated Feb'y 6, 1866.

Entry 441.

10 acres of lot 4, N. W. ¼, S. W. ¼, sec. 35, T. 37, R. 9,—42.60 acres, 5 acres of frac. S. riv., S. W. ¼ sec. 35, T. 37, R. 9,—29.80 acres, sold Feb'y 4, 1867, W. H. Rifenburg for $11.11, amount of taxes returned delinquent in name of Jessee L. Watson for 1865 and 1866. Certificate dated Feb'y 28, 1867. First piece deeded to John G. Earle, Jan'y 6, 1870. (See No. 386 of abstract for tax deed.)

Entry 442.

N. E. ¼, N. W. ¼, sec. 30, T. 37, R. 9,—40 acres, sold Feb'y 3, 1868, to Jacob Forsythe for $10.34, amount of taxes returned delinquent in name of C. G. Wicker for 1866 and 1867. Certificate dated Feb'y 7, 1868.

254 Entry 443.

Lot 4 & frac. S. W. ¼, sec. 35, T. 37, R. 9,—72.40 acres, sold Feb'y 1, 1869, to John G. Earle for $8.20, amount of taxes returned delinquent in name of G. W. Morris for 1867 and 1868. Certificate dated Feb'y 2, 1869.

Entry 444.

The *lis pendens* records in the clerk's office do not show any additional liens filed against the premises described in the caption of abstract.

255 *W. Deed. Cal. Canal & Imp. Co. to Chi. Ter. R. R. Co. First Part of Entry.*

The Calumet Canal and Improvement Company, a corporation duly organized under the laws of the State of Indiana, and having its principal office in the city of Chicago, Cook county, Ill.,

to

The Chicago and Calumet Terminal Railway Company, a corporation organized under the laws of the State of Illinois.

Warranty deed, Oct. 28, 1889, conveys a tract of land situated in the N. E ¼ S. E. ¼ sec. 30, T. 37, N., R. (W. of the 2nd P. M. and described as follows: Beginning at a point on the east line of said section 30, that is distant $54\frac{8}{10}$ feet southerly from the northeast corner of said N. E. ¼ S. E. ¼; thence southwesterly on a curve convex to the southeast, and having a radius of $1{,}587\frac{3}{10}$ feet, a distance of

$1,236\frac{4}{10}$ feet to a point on the north boundary line of the right of way of the State line and Indiana City railway, that is distant 1,055.84 feet westerly from the point of intersection of said north boundary line with the said east line of section 30; thence northeasterly in a straight line along the said north boundary line, a distance of 1,055.84 feet to the said east line of section 30; thence northerly along said east line of section 30, a distance of 555 feet to place of beginning, as indicated by red color on attached plat, containing 4.48 acres, in Lake Co., Ind., for the sum of $1,175. Signed by Joseph T. Torrence, president, and Robert E. Tod, secretary, and seal of company attached. Acknowledged regularly before Marshall Lapham, notary public, in Cook Co., Ill. Recorded Nov. 2, 1889, in Book No. 49, pages 23 & 24.

(Map omitted.)

NOTE.—No further search made on this land.

256 *Dedication to Public.*

(First part of entry No. 7.)

The Standard Steel and Iron Company & the Calumet Canal and Improvement Company, corporations duly organized, by Joseph T. Torrence, president, and Robert E. Tod, secretary, and seals of both companies attached, and R. Clarke Forsyth (unmarried) and George H. Helberg (unmarried)
to
The Public.

Dedication dated March 10, 1890.

Whereas, the undersigned are desirous of laying out and establishing a public highway in said county along the route hereinafter described, and are severally the owners of all the tracts and parcels of land over which said highway will pass, therefore they hereby donate, convey and dedicate to the public as and for a public highway, but so long only as the same shall be used as such highway, a strip of land 90 feet in width, the center line of which is described as follows: Commencing at the southwest corner of the S. E. ¼, sec. 20, T. 37 N., R. 9 W. of the 2nd P. M., running thence north along the half-section line, through sections 20 and 17 to the southwest corner of the N. W. ¼ N. E. ¼ of sec. 17 of said T. and R. to have and to hold the same for the use of a public highway, but for no other purpose, subject however to the rights of way of all railroads and waterways heretofore given or conveyed. Acknowledged regularly before Marshall Lapham, a notary public, in Cook Co., Ill. Recorded March 11, 1890, in Miscellaneous Record No. 7, pages 176 & 177.

257 *Offer of Deed, Forsyth to Green.*

Mr. JOHNSTON: I next offer in evidence a certified copy of a warranty deed from Caroline M. Forsyth to William W. Green, dated Nov. 10, 1881.

Objection.

Defendant Mason objects to the introduction of the deed on the ground that it is not properly certified and in so far as it affects the title to sections 12, 13 and 24 in range 10 for the reason that the land has never been surveyed.

The court overruled the objection to the introduction of the certified copy of the above deed, to which ruling of the court the defendant Mason at the time excepts.

And thereupon the plaintiff read in evidence the certified copy of the deed from Caroline M. Forsyth to William W. Green, which certified copy is as follows:

Deed, Forsyth to Green.

Caroline M. Forsythe to Wm. W. Green. } W. D.

This indenture, made this tenth (10th) day of November in the year of our Lord, one thousand, eight hundred and eighty-one (1881) between Caroline M. and Jacob Forsythe, her husband, of North township, in the county of Lake and State of Indiana, parties of the first part, and William W. Green of Palisades township, in the county of Bergen and State of New Jersey.

Witnesseth. That the said parties of the first part for and in consideration of the sum of one million dollars ($1,000,000.00) in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged and the said party of the second part forever released and discharged therefrom, have granted, bargained, sold, remised, released, conveyed, aliened and confirmed and by these presents do grant, bargain, sell, remise, release, convey, alien and confirm unto the said party of the second part, and to his heirs and assigns forever all the following-described lots, pieces or parcels of land, situate in the county of Lake and State of Indiana and known and described as follows, to wit: The west half of the southwest quarter of section six (6), the northwest quarter of the northwest quarter and the south half of the southwest quarter and the southwest quarter of the northeast quarter and lots one (1), two (2), three (3) and four (4) in the south half of section seven (7), the west half of the southwest quarter of section eight (8), the northeast fractional quarter, the east half of the southeast quarter
258 the east half of the northwest quarter and the west half of the southwest quarter of section sixteen (16) lots one (1) and two (2) fractional southwest quarter of section 15, the north half (except the southeast quarter of the northwest quarter and the south half except the northeast quarter of the southwest quarter) of section seventeen (17) lots three (3) and four (4) of the southeast fractional quarter of section eighteen (18), all of fractional section nineteen (19), all of section twenty (20), all of section twenty-one (21), all of section twenty-two (22), all of sections twenty-seven (27)

twenty-eight (28), and twenty-nine (29), the northeast quarter of the north half of the northwest quarter, and the north half of the southeast quarter, and the southeast quarter of the southeast quarter of section thirty (30), all of section thirty-two (32), north of the river (except the west half of the northwest quarter and the northwest quarter of the northeast quarter), and the north half and the south half, north of the river of section thirty-three (33), and the north half and all of the south half of section thirty-four (34), north of the river, the west fractional half, including the fraction south of the river, of the southwest quarter of section thirty-five (35), all in township thirty-seven (37), north, range nine (9) west of second 2nd principal meridian, also lots two (2) and three (3) and all of lot one (1) (except five and $\frac{82}{100}$ acres heretofore conveyed to E. A. and C. B. Shedd and except the strip of land lying between the rights of way of the Pittsburg, Fort Wayne and Chicago railroad, and of the Lake Shore and Michigan Southern railroad, containing about two acres heretofore conveyed to John Kreuter) in the northeast quarter and the southeast fractional quarter of section one (1), lots one (1), two (2), three (3), and four (4) in section twelve (12), lots one (1) and two (2) in section thirteen (13), lots two (2) and three (3), and the southeast quarter of the southeast quarter and the west half of the north half of the southwest quarter of section twenty-four, all in township thirty-seven (37) north, range ten west of 2nd P. M., containing in all eight thousand acres more or less: also the east half of the southwest quarter, and the west half of the southeast quarter of section sixteen (16), township thirty-seven (37), north range nine (9) west of 2nd P. M. Excepting however from this conveyance the north one hundred and sixty (160) acres of the following-described tract, commencing at a point on the east line of the Indiana boulevard where the center line of section twenty (20) in
259 township thirty-seven (37) north, range nine (9) west, intersects the same running thence east along said centre line to the quarter post, on the east line of said section twenty (20) thence southeasterly in a straight line to the southeast corner of the north half of the northwest quarter of section twenty-eight (28), in the township and range last aforesaid, thence west on the south line of said north half of said northwest quarter of section twenty-eight (28) to the east line of said Indiana boulevard, thence northwesterly along the easterly line of said boulevard to the point or place of beginning, the south line of said one hundred and sixty (160) acres hereby excepted to be parallel with the south line of said last described tract. This conveyance is made subject to existing highways and railroad rights of way, upon and across various portions of said lands, together with all and singular, the hereditaments and appurtenances thereunto belonging or in anywise appertaining the accretions, water, lake-bed rights and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim or demand whatsoever of the said parties of the first part either in law or equity, of, in and to the above-bargained premises, with the hereditaments and appurtenances, to have and to hold the said premises above bargained and

described with the appurtenances unto the said party of the second part, his heirs and assigns forever. And the said parties of the first part, for themselves their heirs, executors and administrators do covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns that at the time of the ensealing and delivery of these presents the said Caroline M. Forsythe is well seized of the premises above conveyed, as of a good, sure, perfect absolute and indefeasible estate of inheritance in law, in fee-simple and hath good right, full power, and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid, and that the same are free and clear of and from all other grants, bargains, sales, liens, taxes, assessments and incumbrances of what kind or nature soever. And the said parties of the first part, do further covenant and agree that they, their heirs, and each of them and all and every other person or persons whosoever lawfully or equitably deriving any estate, right, title, or interest, of, in, or to the above-granted premises, by, from, under or in trust for them, or either of them, shall and will at any time or times hereafter upon the reasonable request and at the proper costs, and charges in the
260 law of the said party of the second part, his heirs and assigns, make, do and execute, or cause or procure to be made, done and executed all, and every such further and other lawful, and reasonable acts, conveyances and assurances in the law, for the better and more effectually vesting and confirming the premises hereby granted, or intended so to be, in and to the said party of the second part, his heirs and assigns forever, as by the said party of the second part, his heirs or assigns or his, or their counsel learned in the law, shall be reasonable desired, advised or required, and the above-bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns against all and every person or persons lawfully claiming, or to claim the whole or any part thereof the said parties of the first part shall and will warrant and forever defend.

And the said parties of the first part and each of them hereby expressly waive and release any and all right, benefit, privilege, advantage and exemption under and by virtue of any and all statutes of the State of Indiana, providing for the exemption of homesteads from sale or execution or otherwise.

In witness whereof the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

CAROLINE M. FORSYTHE. [SEAL.]
JACOB FORSYTHE. [SEAL.]

STATE OF INDIANA, } ss:
Lake County, }

I, Amos Allman, a notary public in and for said county of Lake and State of Indiana, do hereby certify that Caroline M. Forsythe and Jacob Forsythe, her husband, personally known to me as the same persons, whose names are subscribed to the foregoing deed, appeared before me this day in person and each acknowledged that she or he signed, sealed and delivered the said deed as her or his

free and voluntary act for the uses and purposes therein set forth and thereby conveyed all right, title and interest of each and both of them in, and to the premises described in said deed and expressly waived and released all right, claim, privilege, benefit, advantage and exemption under any and all homestead exemption laws, so called of the State of Indiana.

Given under my hand and notarial seal, this tenth day of November A. D. 1881.

[SEAL.] AMOS ALLMAN,
Notary Public.

261 Filed for record Nov. 10th, 1881, at 1 p. m.
RICHARD W. PRICE, *Recorder.*

STATE OF INDIANA, } ss :
Lake County, }

I, John F. Krost, recorder in and for said county and State, do hereby certify that the writing contained in and on the foregoing pages is a full, true and complete copy of the record of a warranty deed as recorded in this office on the 10th day of November, 1881, in Deed Record No. 32, page 50, together with the certificate of Richard Price, then recorder of said county, as to the recording of the same, as now appears of record in this office, and of which record I am now the custodian.

Witness my hand and official seal, this 9th day of August, 1895.

[SEAL.] JOHN F. KROST,
Recorder of Lake Co.

32–50–3.

Offer of Deed, Green to E. Chi. Imp. Co.

The plaintiff next offered and read in evidence a certified copy of a deed from William W. Green to the East Chicago Improvement Company, dated December 13, 1881, which certified copy is as follows:

262 *Deed, Green to E. Chic. Imp. Co.*

Wm. W. Green
to
East Chicago Improvement Company. } Q. C. D.

This indenture, witnesseth, that the grantor, William W. Green, a bachelor of Palisades township, in the county of Bergen and State of New Jersey, for the consideration of ten dollars conveys and quit-claims to the East Chicago Improvement Company, a corporation created and existing under the laws of the State of New Jersey, all interest in the following-described real estate situated in the county of Lake, in the State of Indiana, to wit: Lot four (4) and the fraction south of the river, both in the southwest quarter of section thirty-five (35) in township thirty-seven (37) north of range nine (9) west of the second principal meridian, containing seventy-two and forty one-hundredths (72.40) acres more or less.

Together with all and singular the heréditaments and appurtenances, the accretions, water and lake-bed rights, the reversion and reversions, remainder and remainders, the rents, issues and profits, in anywise appertaining or belonging to said lot four (4) and to said fraction south of the river, and also to each and every, and all the premises heretofore conveyed by the grantor herein to the grantee herein, by deed dated November tenth (10th) A. D. 1881 and recorded said November 10th A. D. 1881 in the recorder's office of Lake county, Indiana, in Book 32 of Deeds, pages 54 to 56; hereby releasing and waiving all rights under and by virtue of the homestead-exemption laws of the State of Indiana.

Dated this twelfth day of December A. D. 1881.

WILLIAM W. GREEN. [SEAL.]

263 STATE OF NEW YORK, } ss:
County of New York, }

I, Allen McCulloh, a notary public, in and for said county and State aforesaid do hereby certify, that William W. Green, personally known to me to be the same person whose name is subscribed to the foregoing deed, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said deed, as his free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and official seal this thirteenth day of December A. D. 1881.

[SEAL.] ALLEN McCULLOH,
Notary Public (28), *New York County.*

Filed for record Dec. 19th, 1881 at 11 a. m.

RICHARD W. PRICE, *Recorder.*

STATE OF INDIANA, } ss:
Lake County, }

I, John F. Krost, recorder in and for said county and State, do hereby certify that the writing contained in and on the foregoing pages is a full, true and complete copy of the record of a quitclaim deed as recorded in this office on the 19th day of December, 1881, in Deed Record No. 32, page 146, together with the certificate of Richard W. Price then recorder of said county, as to the recording of the same, as now appears of record in this office, and of which record I am now the custodian,

Witness my hand and official seal, this 9th day of August, 1895.

[SEAL.] JOHN F. KROST,
Recorder of Lake County.

264 *Offer of I. C. Deed—Green to E. Chic. Imp. Co.*

The plaintiff next offered and read in evidence a quitclaim deed from William W. Green to the East Chicago Improvement Company, dated Nov. 10, 1881, which deed is duly certified to and is in the words and figures following:

Deed—Green to E. Chi. Imp. Co.

William W. Green
to
East Chicago Improvement Co.

This indenture witnesseth, that the grantors, William W. Green, a bachelor of Palisades township, in the county of Bergen and State of New Jersey, for and in consideration of the sum of three million dollars ($3,000,000) in hand paid, quitclaims to the East Chicago Improvement Company, a corporation organized and existing under the laws of the State of New Jersey, the following-described real estate, to wit: the west half of the southwest quarter of section six (6), the northwest quarter of the northwest quarter, and the south half of the northeast quarter and the southwest quarter of the northeast quarter and lots one (1), two (2), three (3) and four (4) in the south half of section seven (7); the west half of the southwest quarter of section eight (8) the northeast fractional quarter, the east half of the southeast quarter, the east half of the northwest quarter and the west half of the southwest quarter of section sixteen (16), lots one (1) and two (2), fractional southwest quarter of section fifteen (15) the north half (except the southeast quarter of the northwest quarter) and the south half except the northeast quarter of the southwest quarter, of section seventeen (17), lots three (3) and four (4) of the southeast fractional quarter of section eighteen (18) all of fractional section nineteen (19), all of section twenty (20), all of section twenty-one (21) all of fractional section twenty-two (22), all of sections twenty-seven (27), twenty-eight (28) and twenty-nine (29), the northeast quarter, and the north half of the northwest quarter, and the north half of the southeast quarter, and the southeast quarter of the southeast quarter of section thirty (30), all of section thirty-two (32), north of the river (except the west half of the northwest quarter and the northwest quarter of the northeast quarter) the north half and the south half north of the river of section thirty-three (33), the the north half and all of the south half of section thirty-four (34) north of the river, the west fractional half, including the fraction south of the river, of the southwest quarter of section thirty-five (35), all in township thirty-seven (37) north, range nine (9) west of the second principal meridian.

Also lots two (2) and three (3) and all of lot one (1), except five and $\frac{82}{100}$ acres heretofore conveyed to E. A. and C. B. Shedd and except the strip of land lying between the rights of way of the Pittsburg, Fort Wayne and Chicago railroad and of the Lake Shore and Michigan Southern railroad, containing about two acres heretofore conveyed to John Kreuter, in the northeast quarter and the southeast fractional quarter of section one (1), lots one (1), two (2), three (3) and four (4) in section twelve (12), lots one (1) and two (2) in section thirteen (13), lots two (2) and three (3) and the southeast quarter of the southeast quarter and the west half of the north half of the southwest quarter of section twenty-four (24), all in township thirty-seven (37), north range ten (10), west of the second principal merid-

ian, containing in all eight thousand acres more or less. Also the east half of the southwest quarter and the west half of the southeast quarter of section sixteen (16), township thirty-seven (37), north, range nine (9) west of the second principal meridian, exception however from this conveyance the north one hundred and sixty (160) acres of the following-described tract, commencing at a point on the east line of Indiana boulevard where the center line of section twenty (20) in township thirty-seven (37) north range nine (9) west of the second principal meridian intersects the same, running thence east along said centre line to the quarter post on the east line of said section twenty (20) thence southeasterly in a straight line to the southeast corner of the north half of the northwest
265 quarter of section twenty-eight (28) in the township and range last aforesaid, thence west on the south line of said north half of said northwest quarter of section twenty-eight (28) to the east line of said Indiana boulevard, thence northwesterly along the easterly line of said boulevard to the point or place of beginning. The south line of said one hundred and sixty (160) acres hereby excepted, to be parallel with the south line of said last-described tract.

All of said lands being situated in the county of Lake and State of Indiana. This conveyance is made subject to existing highways and railroad rights of way, upon and across various portions of said land. And the grantor hereby releases and waives all rights under and by virtue of the homestead exemption, stay and valuation laws of the State of Indiana, and the grantor hereby assumes and agrees to pay and discharge as part of the consideration hereof the following sums of money secured upon said premises, first the sum of six hundred and sixty-six thousand, six hundred and sixty-six dollars and sixty-seven cents ($666,666.67) and interest due Caroline M. Forsythe, second the sum of *g*hree hundred and twenty-three thousand, three hundred and thirty-three dollars and thirty-three cents ($323,333.33) and interest due Charles B. Alexander, provided that this covenant as to said $666,666.67 and interest is not to be construed as one for the benefit of, or enforceable by said Caroline M. Forsythe.

Dated this 10th *tenth* day of November A. D. 1881.

[SEAL.] WILLIAM W. GREEN.

STATE OF INDIANA, } ss:
County of Lake, }

I, Amos Allman, a notary public in and for said county and State aforesaid, do hereby certify that William W. Green personally known by me to be the same person, whose name is subscribed to the foregoing instrument appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth, including the release and waiver of all rights under and by virtue of the homestead exemption, stay and valuation laws of the State of Indiana.

Given under my hand and notarial seal this 10th day of November A. D. 1881.

[SEAL.] AMOS ALLMAN,
Notary Public.

Filed for record Nov. 10th, 1881, 1.10 p. m.
RICHARD W. PRICE, *Recorder.*

266 STATE OF INDIANA, } ss:
Lake County, }

I, John F. Krost, recorder in and for said county and State, do hereby certify that the writing contained in and on the foregoing pages is a full, true and complete copy of the record of a quitclaim deed as recorded in this office on the 10th day of November, 1881, in Deed Record No. 32, page 54 together with the certificate of Richard W. Price, then recorder of said county, as to the recording of the same, as now appears of record in this office, and of which record I am now the custodian.

Witness my hand and official seal, this 9th day of August, 1895.

JOHN F. KROST,
[SEAL.] *Recorder of Lake County.*

Offer of Deed, E. Chi. Imp. Co. to Torrence.

The plaintiff next read in evidence a quitclaim deed from the East Chicago Improvement Company to Joseph T. Torrence, dated July 11, 1887, which quitclaim deed is in the words and figures following:

267 *E. Chi. Imp. Co. to Torrence.*

East Chicago Imp. Co. }
to
Joseph T. Torrence. }

This indenture, made this eleventh day of July, 1887, witnesseth, that the grantor, The East Chicago Improvement Company a corporation organized and existing under the laws of the State of New Jersey, for and in consideration of the sum of one hundred dollar-lawful money of the United States to it, in hand paid and for other good and valuable consideration-, hath quitclaimed and by these presents does quitclaim to Joseph T. Torrence of the city of Chicago, county of Cook and State of Illinois, the following-described real estate, to wit: The west half of the southwest quarter of section six (6), the northwest quarter of the northwest quarter and the south half of the northwest quarter and the southwest quarter of the northeast quarter and lots one (1), two (2), three (3) and four (4) in the south half of section seven (7), the west half of the southwest quarter of section eight (8), the northeast fractional quarter, the east half of the southeast quarter, the east half of the east half of the northwest quarter and the west half of the southwest quarter of section sixteen (16), lots one (1) and two (2), fractional southwest quarter of section fifteen (15), the north half (except the southeast quarter of the northwest quarter) and the south half (except the northeast quarter of the southwest quarter) of section seventeen (17), lots three (3), and four (4) of the southeast fractional quarter of section eigh-

teen (18), all of fractional section nineteen (19), all of section twenty (20) all of section twenty-one (21) all of fractional section twenty-two (22), all of section- twenty-seven (27), twenty-eight (28) and twenty-nine (29), the northeast quarter and the north half of the northwest quarter and the north half of the southeast quarter and the southeast quarter of the southeast quarter of section thirty (30), all of section thirty-two (32) north of the river (except the west half of the northwest quarter and the northwest quarter of the northeast quarter) the north half and the south half, north of the river, of section thirty-three (33) the north half and all of the south half of section thirty-four (34), north of the river, the west fractional half including the fraction south of the river of the southwest quarter of section thirty-five (35) all in township thirty-seven (37), north of range nine (9) west of the second principal meridian. Also lots two (2) and three (3) and all of lot one (1), except five and $\frac{87}{100}$ acres heretofore conveyed to E. A. and C. B. Shedd and except the strip of land lying between the rights of way of the Pittsburg, Fort Wayne and Chicago
268 railroad and the Lake Shore and Michigan Southern railroad containing about two (2) acres and heretofore conveyed to John Kreuter, in the northeast quarter, and the southeast fractional quarter of section one (1), lots one (1), two (2) three (3) and four (4) in section twelve (12), lots one (1) and two (2) in section thirteen (13), lots two (2) and three (3) and the southeast quarter of the southeast quarter and the west half of the north half of the southwest quarter of section twenty-four (24), all in township thirty-*p*seven (37) north, range ten (10) west of the second principal meridian, containing in all eight thousand acres more or less; also the east half of the southwest quarter and the west half of the southeast quarter of section sixteen (16), township thirty-seven (37) north, range nine (9) west of the second principal meridian, excepting, however, from this conveyance the north one hundred and sixty (160) acres of the following-described tract. Commencing at a point on the east line of the Indiana boulevard, where the centre line of section twenty (20) in township thirty-seven (37), north range nine (9) west, of the second principal meridian intersects the same, running thence east along said centre line to the quarter post on the east line of section twenty (20), thence southeasterly in a straight line to the southeast corner of the north half of the northwest quarter of section twenty-eight (28), in the township and range last aforesaid thence west on the south line of said north half of said northwest quarter of section twenty-eight (28) to the east line of said Indiana boulevard, thence northwesterly along the easterly line of said boulevard to the point or place of beginning, the south line of said one hundred and sixty (160) acres hereby excepted to be parallel with the south line of said last-described tract. All of said land being situated in the county of Lake and State of Indiana.

This conveyance is made subject to existing highways and railroad rights of way upon and across various portions of said lands, being the same property conveyed to the grantor herein by William W. Green, by deed of quitclaim, dated the tenth day of November,

1881, and recorded in the office of the recorder of Lake county, on the said tenth day of November, 1881, in Book 32 of deeds, pages 54 to 56.

It is expressly understood and agreed that this deed is made by the grantor above named without warranty express or implied. But this deed is intended to convey to the grantee therein named, all the right title and interest of the grantor, in, and to the property hereinbefore described, and in and to such other rights if any as the grantor may have.

269 In witness whereof the East Chicago Improvement Company has caused this indenture to be signed in its corporate name by its president and has caused its corporate seal to be hereunto affixed and attested by its secretary in pursuance of the resolution of its board of directors.

THE EAST CHICAGO IMPROVEMENT COMPANY,

[SEAL.] By ALFRED B. THACHER, *President.*

Attest: WILLIAM J. CAMPBELL, *Secretary.*

STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that on this 25th day of July, 1887, before me, Allen McCulloh, a notary public, in and for the city and county of New York, duly commissioned and qualified, personally appeared Alfred B. Thacher and William J. Campbell, the persons who executed the foregoing deed, as president and secretary of the East Chicago Improvement Company the grantor therein, being both of lawful age, and both to me personally known and known to me to be respectively such president and secretary, and they severally acknowledged to me the execution of the same, and that they executed the same as the deed of the said East Chicago Improvement Company. And they further being severally by me duly sworn did severally depose and say that they were both above the age of twenty-one years, and of sound minds and memory, and laboring under no disability so far as they severally knew, that they were well acquainted with each other, that they resided in the city, county and State of New York; that the said Alfred B. Thacher was the president and the said William J. Campbell was the secretary of the East Chicago Improvement Company, the grantor in said deed, that they knew the corporate seal of said company, that the seal annexed to said deed is such corporate seal, and was thereto affixed in their presence by the authority of the board of directors of said company and that they severally at the same time in the presence of each other signed their names as such officers by the authority.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

270 [SEAL.] ALLEN McCULLOH,
Notary Public (13), *N. Y. County.*

Filed for record, July 27, 1887 at 3 p. m.

E. P. AMES, *Recorder.*

STATE OF INDIANA, } ss:
Lake County, }

I, John F. Krost, recorder in and for said county and State, do hereby certify that the writing contained in and on the foregoing pages is a full, true and complete copy of the record of a quitclaim deed as recorded in this office on the 27th day of July, 1877, in Deed Record No. 42, page 176 together with the certificate of E. P. Ames, then recorder of said county, as to the recording of the same, as now appears of record in this office, and of which record I am now the custodian.

Witness my hand and official seal, this 9th day of August, 1895.

JOHN F. KROST,
[SEAL.] *Recorder of Lake County.*

42–176.

271 *Offer of Deed, Torrence to Cal. Canal & Imp. Co.*

The plaintiff offered and read in evidence a quitclaim deed from Joseph T. Torrence to the Calumet Canal and Improvement Company, dated July 27, 1887; which quitclaim deed is as follows:

Deed, Torrence to Cal. Canal & Imp. Co.

Joseph T. Torrence
to
Cal. Can. & Imp. Co.

The grantors, Joseph T. Torrence and Libbie N. Torrence, his wife of the city of Chicago, in the county of Cook and State of Illinois, for and in consideration of one dollar, convey and quitclaim to the Calumet Canal and Improvement Company, a corporation duly organized under the laws of the State of Indiana, all interest in the following-described real estate, to wit: The west one-half of the southwest quarter of section six (6), the northwest quarter of the northwest quarter and the south half of the northwest quarter and the southeast quarter of the northeast quarter and lots one, two, three and four (1, 2, 3, 4) being the south half of section seven (7), the west half of the southwest quarter of section eight (8), the northeast fractional quarter, the southeast quarter, the east half of the northwest quarter and the southwest quarter of section sixteen (16), all of fractional section fifteen (15), the north half (except the southeast quarter of the northwest quarter) and the south half (except the northeast quarter of the southwest quarter) of section seventeen (17) lots three (3) and four (4) b-ing the southeast fractional quarter of section eighteen (18), all of fractional section nineteen (19), all of section twenty-one (21), all of fractional section twenty-two (22), the north half, and the southeast quarter of section twenty (20), all of section twenty-seven (27), all of section twenty-eight (28), the northeast quarter and the north half of the northwest quarter and the north half of the southeast quarter and the southeast quarter of the south-

east quarter of section thirty (30), all of section thirty-three (33), north of the Calumet river, all of section thirty-four (34) north of the Calumet river, the west fractional half including the fraction south of the river of the southwest quarter of section thirty-five (35), all in township thirty-seven (37) north of range nine (9) west of the second P. M., lots three (3) of section one (1), all of lot one (1) of said section except five and eighty-two one-hundredths (5.82) acres, heretofore conveyed by Caroline M. and Jacob Forsythe to E. A. and C. B. Shedd, and except the strip of land lying between the rights of way of the Pittsburg, Fort Wayne and
272 Chicago railroad and the Lake Shore and Michigan Southern railroad heretofore conveyed by Caroline M. and Jacob Forsythe to John Kreuter, and all of lot two (2) of said section one (1) except the portion of said lot described as follows: Commencing at the northeast corner of said lot two (2), running thence south along the east line of said lot two (2), thirteen and fifty-three one-hundredths (13.53) *cah*ins, thence west parallel with the north line of said lot two (2) to the east bank of the Wolf river, thence northeasterly along said east bank to the north line of said lot two (2), thence east along said north line to place of beginning, containing twenty-two (22) acres of land more or less. Lots one, two, three, and four (1, 2, 3, 4) being the fractional east half *in* section twelve (12), all of fractional section thirteen (13), lots two & three (2 & 3) (being the north half) and the southeast quarter of the southeast quarter and the west half of the north half of the southwest fractional quarter of section twenty-four (24), all in township thirty-seven (37) north of range ten (10) west of the second P. M. excepting however from this conveyance the north one hundred sixty (160) acres of the following-described tract. Commencing at a point on the east line of the Indiana boulevard where the centre line of section twenty (20), in township thirty-seven (37) north range nine (9) west, intersects the same, running thence east along the centre line to the quarter post on the east line of said section twenty (20), thence southeasterly in a straight line to the southeast corner of the north half of the northwest quarter of section twenty-eight (28), in the township and range last aforesaid. Thence west on the south line of said north half of the northwest quarter of section twenty-eight (28) to the east line of said Indiana boulevard, thence northwesterly along the easterly line of said boulevard, to the point or place of beginning. The south line of said one hundred sixty (160) acres hereby excepted to be parallel with the south line of the said last-described tract.

This conveyance is made subject to existing highways and railroad rights of way upon and across various portions of said land.

In witness whereof the parties hereto have hereunto set their hands and seals this ninth day of July, one thousand eight hundred and eighty-seven (1887).

JOSEPH T. TORRENCE. [SEAL.]
LIBBIE N. TORRENCE. [SEAL.]

Signed, sealed and delivered in presence of
GEORGE TOD.

6—47

273 STATE OF NEW YORK, } ss:
City and County of New York, }

I, William E. Trotter, a notary public, in and for said county in the State aforesaid, do hereby certify that Joseph T. Torrence and Libbie N. Torrence, his wife, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed sealed and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth including the release and waiver of the right of homestead.

Given under my hand and notarial seal this twelfth day of July, 1887.

WM. E. TROTTER,
[SEAL.] *Notary Public, N. Y. Co., N. Y.*

Filed for record, July 27th, 1887, at 3 p. m.
E. P. AMES, *Recorder.*

STATE OF INDIANA, } ss:
Lake County, }

I, John F. Krost, recorder in and for said county and State, do hereby certify that the writing contained in and on the foregoing pages is a full, true and complete copy of the record of a quitclaim deed as recorded in this office on the 27th day of July, 1887 in Deed Record No. 42, page 180 together with the certificate of E. P. Ames then recorder of said county, as to the recording of the same, as now appears of record in this office, and of which record I am now the custodian.

Witness my hand and official seal, this 9th day of August, 1895.
JOHN F. KROST,
[SEAL.] *Recorder of Lake Co.*

42–180.

274 *Offer of Q. C. Deed, Torrence to Cal. Canal & Imp. Co.*

The plaintiff offered and read in evidence a quitclaim deed from Joseph T. Torrence to the Calumet Canal and Improvement Company, dated Aug. 16, 1892, which said deed is as follows, to wit:

Q. C. Deed, Torrence to Cal. Canal & Imp. Co.

Joseph T. Torrence
to
Calumet Canal & Imp. Company. } Q. C. D.

The grantor, Joseph T. Torrence, a widower of the city of Chicago, in the county of Cook, and State of Illinois for and in consideration of one dollar, convey- and quitclaim- to the Calumet Canal and Improvement Company, a corporation duly organized under the laws of the State of Indiana, all interest in the following-described real estate, to wit:

The west one-half of the southwest quarter, of section six (6), the northwest quarter of the northwest quarter and the south half of the northwest quarter and the southwest quarter of the northeast quarter and lots one (1), two (2), three (3) and four (4), being the south half of section seven (7), the west half of the southwest quarter of section eight (8), the northeast fractional quarter, the southeast quarter, the east half of the northwest quarter and the southwest quarter of section sixteen (16), all of fractional section fifteen (15), the north half (except the southeast quarter of the northwest quarter) and the south half (except the northeast quarter of the southwest quarter) of section seventeen (17), lots three (3) and four (4), being the southeast fractional quarter of section eighteen (18), all of fractional section nineteen (19), all of section twenty-one (21), all of fractional section twenty-two (22), the north half and the southeast quarter of section twenty (20), all of section twenty-seven (27), all of section twenty-eight (28), the northeast quarter and the north half of the northwest quarter and the north half of the southeast quarter and the southeast quarter of the southeast quarter of section thirty (30), all of section thirty-three (33) north of the Calumet river, all of section thirty-four (34) north of the Calumet river, the west fractional half, including the fraction south of the river of the southwest quarter of section thirty-five (35), all in township thirty-seven (37) north, range nine (9) west of the second P. M. "Lots" (3) three of section one (1), all of lot one (1) of said section except five and eighty-two one-hundredths (5.82) acres heretofore conveyed by Caroline M. and Jacob
275 Forsythe to E. A. and C. B. Shedd, and except the strip of land lying between the rights of way of the Pittsburg, Fort Wayne and Chicago railroad and the Lake Shore and Michigan Southern railroad, heretofore conveyed by Caroline M. and Jacob Forsythe to John Kreuter and all of lot two (2) of said section one (1) except the portion of said land described as follows: Commencing at the northeast corner of said lot two (2), running thence south along the east line of said lot two (2), thirteen and fifty-three one-hundredths (13.53) chains, thence west parallel with the north line of said lot two (2) to the east bank of the Wolf river, thence northeasterly along said east bank, to the north line of said lot two (2), thence east along said north line to place of beginning, containing twenty-two (22) acres of land more or less. Lots one (1), two (2), three (3) and four (4) being the fractional east half in section twelve (12), all of fractional section thirteen (13), lots two (2) and three (3) being the north half and the southeast quarter, of the southeast quarter, and the west half of the north half of the southwest fractional quarter of section twenty-four (24), all in township thirty-seven (37) north range ten (10) west of the second P. M. excepting however from this conveyance the north one hundred sixty (160) acres of the following-described tract. Commencing at a point on the east line of the Indiana boulevard where the centre line of section twenty (20) in township thirty-seven (37), north range nine (9) west, intersects the same running thence east along the centre line to the quarter post on the east line of said section twenty (20), thence southeasterly in a straight line to the southeast corner of the north half of the northwest quarter of section

twenty-eight (28) in the township and range last aforesaid, th
west on the south line of said north half of the northwest quart
section twenty-eight (28) to the east line of said Indiana boule
thence northwesterly along the easterly line of said boulevard t
point or place of beginning, the south line of said one hundred
(160) acres hereby excepted, to be parallel with the south line of
last-described tract.

This conveyance is made subject to existing highways and rail
rights of way, upon and across various portions of said lands.

In witness whereof, the grantor herein has hereunto set his
and seal this sixteenth day of August, one thousand, eight hun
and ninety-two.

JOSEPH T. TORRENCE. [SEA

276 STATE OF ILLINOIS, } ss :
County of Cook, }

I, Marshall Lapham, a notary public, in and for said count
the State aforesaid, do hereby certify, that Joseph T. Torrence,
sonally known to me to be the same person whose name is
scribed to the foregoing instrument appeared before me this da
person and acknowledged that he signed, sealed and delivered
said instrument as his free and voluntary act, for the uses and
poses therein set forth, including the release and waiver of the
of homestead.

Given under my hand and notarial seal this 16th day of Au
1892.

[SEAL.] MARSHALL LAPHAM,
Notary Publ

Filed August 30th, 1892, at 8 a. m.

ED. P. AMES, *Record*

60–163–65.

STATE OF INDIANA, } ss :
Lake County, }

I, John F. Krost, recorder in and for said county and Stat
hereby certify that the writing contained in and on the foreg
pages is a full, true and complete copy of the record of a quitc
deed, as recorded in this office on the 30th day of August, 1892,
the certificate of Ed. P. Ames, then recorder of said county, as t
recording of the same, as now appears of record in this office, a
which record I am now the custodian.

Witness my hand and official seal, this 9th day of August,

JOHN F. KROST,
Recorder of Lake Cou

277 *Plaintiff Rests.*

And the plaintiff here rests.

FOLD OUT IS TOO LARGE TO BE FILMED

Evidence in Behalf of Def't Kean.

And the defendant Kean in order to sustain the issues on her behalf introduced the following evidence:

Plat and Field-notes. New Survey.

Mr. FENNELL: I offer in evidence a plat and field-notes of what is called the new survey.

The plaintiff objected to the introduction of the plat and field-notes in evidence on the ground that the Government had nothing at the time to plat, nothing to survey and nothing to sell.

The plat and field-notes *was* marked Exhibit A.

The court took the objections to the plat and field-notes under advisement, and after being fully advised the court overruled the objections to which ruling the plaintiff excepted, and thereupon over the objections of plaintiff the said plat and filed-notes were introduced and read in evidence and are as follows:

(Here follow diagrams marked p. 278.)

279 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C. *September 10th*, 1889.

I, W. M. Stone, acting Commissioner of the General Land Office, do hereby certify that the annexed copy of the field-notes of the survey of the beds of Wolf and George lakes in township 37 north, ranges 9 and 10 west and township 38 north, range 10 west of the 2d principal meridian, Indiana, executed by Alexander Wolcot under instructions from the Commissioner of the General Land Office, dated Oct. 23, 1875 is a true and literal exemplification of said survey on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] W. M. STONE,
Acting Commissioner of General Land Office.

Field Notes, New Survey.

Survey of the Beds of Wolf and George Lakes, Indiana.

Field-notes

of the survey of fractional sections seven (7) eighteen (18) and nineteen (19) in township thirty-seven (37) north, range nine (9) west of the 2d meridian of Indiana, and fractional sections one (1) twelve (12) thirteen (13) and twenty-four (24) in townships thirty-seven (37) north, range ten (10) west of 2nd meridian in Indiana, and fractional section thirty-six (36) township thirty-eight (38) north, range ten (10) west of 2nd meridian of Indiana, in the county of

Lake and State of Indiana, by Alexander Wolcott, deputy surveyor, under his contract with the Commissioner of General Land Office bearing date Oct. 23rd A. D. 1875.

280 Township 37 N., R. 10 W., 2nd Meridian, Indiana.

Section 24.

North. On east line
24.50 Set meander post
40.00 Set ¼ post in water 1½ ft. deep
77.15 Set corner to sections 13 & 24 in water 2½ ft. deep

Section 13.

North. On east line
35.00 To marsh & rice beds
40.00 Set ¼ post in marsh
50.70 To water and rushes
65.00 To meadow
78.02 Set post in mound over charcoal
for corner of 12 & 13

Section 12.

North. On east line
30.95 To edge of timber set post from which
a lynn 8 in. diam. bears S. 64¾° W. 42 lks. dist.
" elm 8 " " " N. 75° W. 46 " "
32.50 Leave timber & enter prairie
40.00 Set ¼ post from which
a double lynn 9 in. diam. bears N. 79° E. 260 lks. dist.
80.00 Set post corner of sections 1 & 12.

281 Section 1.

North. On east line
40.00 Set ¼ post
76.24 South margin of Lake Michigan
Offset west 10.31 chs. & north 767 lks.
17.67 To the north line of sec. 1
set meander post from which
a poplar 8 in. diam. bears east 150 lks. dist.

Nov. 5th 1875.

ALEX. WOLCOT, *D. S.*

Township 37 N., R. 10 W.

West. Between sections 13 & 24
17.00 To land
18.36 Set meander post in mound from which
a W. ash 8 in. diam. bears S. 14¾° E. 173 lks. dist.
" " 16 in. " " N. 0¾° E. 166 " "
22.30 To water
23.36 Set meander post in water 1 ft. deep

40.00 Set ¼ post in water 1½ ft. deep
68.02 Set post on State line water 3 ft. deep
5543 lks. north of 155th mile post
Water full of rushes bottom
level and sand except 5 chains on west side when
the muck is 1 ft. deep.

282 Township 37 N., R. 10 W.

West. Between sections 12 & 13 T. 37 N., R. 10 W.
18.25 Find old meander corner post & witness
23.76 To water
40.00 Set ¼ post in water 1½ ft. deep.
66.90 Set post on State line in water 3 ft. deep
Level sand bottom water full of rushes &grass.
West. Between sections 1 & 12, T. 37 N., R. 10 W.
20.00 Set meander post in mound over charcoal
21.40 To water
34.00 To meadow.
40.00 Set ¼ post in mound over charcoal
49.00 To water
51.00 Set meander in water 3 ft. deep.
66.58 Set post on State line from which
an elm 7 in. diam. bears N. 36° E. 71 lks. dist.
" " 20 " " " S. 44° E. 104 " "
3270 links south of the 158 mile post.

Nov. 6th 1875.

ALEX. WOLCOT, *D. S.*

283 Township 37 N., R. 10 W.

Sec. 1.

West on north line from meander post
10.99 To meander post from which
a burr oak 6 in. diam. bears west 15 lks. dist.
This meander post is 2130 links west of east line of
section 1.
This line is on a sand ridge about 3 ft. above
water in Lake Michigan.

Township 37 N., range 9 W.

West. Between 18 & 19
22.50 Set meander post in mound from which
a blk. oak 10 in. diam. bears S. 80° E. 119 lks. dist.
" " " 8 " " " S. 55° E. 114 " "
27.00 To water
31.00 To marsh
32.00 To water
35.00 To marsh
37.00 To meadow
40.00 Set ¼ post from which

an elm 16 in. diam. bears N. 52° W. 345 lks. dist.
" " 16 " " " " west 465 " "

43.50 To timber consisting of elm, cherry, lynn, ash, etc.
44.65 Elm 16 in. diam.
47.00 To plowed land
49.00 To timerber ridge 100 lks. wide
50.00 To water
75.52 To range line post in water 2½ ft. deep filled with rushes & other vegetation 490 lks. north of corner of sections 13 & 24, T. 37 N., R. 10 W.

Township 37 N., R. 9 W.

West. Between sections 7 & 18, T. 37 N., R. 9 W.
35.00 Set meander post in mound over charcoal
37.00 To water
40.00 Set ¼ post in water 1½ ft. deep
71.00 To meadow

284

75.39 Set post on range line in mound over charcoal 633 lks. north of corner of sect. 12 & 13 T. 37 N. R. 10 W.

Nov. 10th, 1875.

ALEX. WOLCOT, *D. S.*

General Description.

The timber is mostly elm interspersed with white & black ash, lynn, cherry & oak, the ridges of timber are high and dry and can be cultivated in fact the settlers raised corn, potatoes & other garden vegetables the past summer; the meadow lands are very prolific, turning out 2½ tons of hay pr. acre, the marshes are becoming dryer every year & in a few more years will be entirely reclaimed.

ALEX. WOLCOTT, *D. S.*

Offer of Patent, U. S. to St. Indiana.

Mr. FENNELL: Inasmuch as the abstract is very meager so far as the patent to the State of Indiana is concerned, and inasmuch as we have stipulated that the entries in that abstract may go in, I desire to offer in evidence a certified copy of a patent to show that the conveyance was according to the original patent to the State of Indiana.

The patent was marked Exhibit B and was read in evidence and is as follows:

285 *Patent, U. S. to Indiana.*

(Certified copy of patent, Lake county, Indiana.)

No. 4.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, by the act of Congress approved September 28, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits," it is provided that all the "swamp and overflowed lands," made unfit thereby for cultivation, within the State of Indiana which remained unsold at the passage of said act, shall be granted to said State:

And whereas, in pursuance of instructions from the General Land Office of the United States, the several tracts or parcels of land hereinafter described have been selected as "swamp and overflowed lands," inuring to the said State under the act aforesaid, being situated in the district of lands subject to sale at Winamac, Indiana, to wit: (37 N. R. 10 W.)

Also, the whole of fractional sections one, twelve, thirteen and twenty-four, the north half of the southeast quarter, the southeast quarter of the southeast quarter and the northwest quarter of section twenty-five and the whole of fractional section thirty-six, all in township thirty-seven, north of range ten west, containing in all one thousand seven hundred and ninety-one acres and sixty-hundredths of an acre. * * *

According to the official plats of survey of the said lands returned to the General Land Office by the surveyor general. And for which the governor of the said State of Indiana, did on the eighteenth day of December, one thousand, eight hundred and fifty-two, request a patent to be issued to the said State, as required in the aforesaid act.

Now therefore, know ye, that the United States of America in consideration of the premises and in conformity with the act of Congress aforesaid, have given and granted, and by these presents do give and grant unto the said State of Indiana, in fee-simple, subject to the disposal of the legislature thereof, the tracts of land above described. To have and to hold the same, together with all the rights, privileges immunities and appurtenances thereto belonging unto the said State of Indiana, in fee-simple and to its assigns forever.

In testimony whereof, I Franklin Pierce, President of the United States of America have caused these letters to be made patent
286 and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the twenty-fourth day of March, in the year of our Lord, one thousand eight

hundred and fifty-three and of the Independence of the United States the seventy-seventh.

By the President:

FRANKLIN PIERCE,

[SEAL.] By SIDNEY WEBSTER, *Secretary.*

E. S. TERRY,

Recorder of the General Land Office.

Recorded vol. 1, page 79 to 90 inclusive.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Dec.* 6, 1889.

I, Lewis A. Groff, Commissioner of the General Land Office, do hereby certify that the annexed paper, being a copy of so much of the record of swamp land, patent No. 4 Winamac district, Indiana, as far as the same relates to land in township 37, north of range 10 west, is a true and literal exemplification of the same as it appears on the record of this office.

In testimony, whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

LEWIS A. GROFF,

[SEAL.] *Commissioner of the General Land Office.*

287 *Offer of Abstract by Defendant Kean.*

Mr. FENNELL: I offer this abstract in evidence.

Mr. JOHNSTON: The plaintiff objects on the ground that none of them are competent evidence; that the Government had nothing to sell or plat and so hence the parties acquired nothing.

The abstract was marked Exhibit B 11, 5, '95, and the court took the evidence under advisement as to the competency of it.

And the court after being sufficiently advised overruled the plaintiff's objections to which ruling the plaintiff excepted, and thereupon the said abstract was over the plaintiff's objections read in evidence and is as follows:

288–390 *Abstract of Title*

To

Lots five (5), six (6), seven (7), eight (8), nine (9) and ten (10), and the southwest quarter of section twelve (12). Lots three (3), four (4), five (5), six (6), seven (7), and eight (8), and the fractional north half and the fractional southwest quarter of section thirteen (13). Lots four (4), five (5), six (6) and seven (7), in section twenty-four (24). All in township thirty-seven (37) north of range ten (10) west of the second principal meridian.

Also lots five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11) and twelve (12), and the east half of the west half, of section eighteen (18). Lots five (5), six (6), seven (7), eight (8), nine (9),

ten (10) and eleven (11), in section nineteen (19). All in township thirty-seven (37) north of range nine (9) west of the second principal meridian.

All in Lake county in the State of Indiana.

* * * * * * *

391 *Receipt to Kean for Taxes.*

No. 202. Treasurer's office. $389.78.

CROWN POINT, LAKE COUNTY, IND., *Feb. 11th*, 1888.

Received of Annie R. Kean, three hundred eighty-nine and $\frac{78}{100}$ dollars, in full for April and November installments for State, county, township, school, sinking fund, special school, endowment fund, road tax, for the years 1886 and 1887, on property; also on the following-described real estate:

Description of land.	Sec.	Town.	Range.	Acres.	Am't of tax.
Lots 5 to 8.....	12	37	10	162.13	$211.99
Lots 9, 10 & S. W...	12	37	10	192.14	177.79
					389.78

C. C. SMITH,
Treasurer of Lake County.

The following appears on the back of above tax receipt:

FEB. 11, 1888.

I pay this for Annie R. Kean under protest to avoid sale and cloud on her title.

JOHN CULVER.

In presence of
C. C. SMITH, *Treasurer.*
A. A. SAUERMAN.
H. MARBLE, *Auditor.*

392–415 And the defendant Mason to sustain the issues on his behalf introduced the following evidence:

Evidence in Behalf Defendant Mason.

Mr. MCMAHAN: I first introduce in evidence tax deeds from the auditor of Lake county to Thomas J. Wood, dated May 30, 1887, purports to convey lots 5, 6, 7 and 8 and the undivided one-half of lots 3 and 4, all in section 13, township 37 range 10, for the sum of $426.29. Certificate issued for sale, March 6, 1882. Part are for the land within the bed of the lake and part for land without the lake bed.

The COURT to Mr. McMahan: Why not introduce all your tax deeds at one time and shorten the matter.

Mr. MCMAHAN: I will now introduce these nine tax deeds in evidence.

The said nine tax deeds were read in evidence, and are as follows:

416 *Testimony of S. A. Kean.*

SAMUEL A. KEAN one of the defendants, being duly sworn, testified as follows:

Examined by Mr. FENNELL:

Q. Tell briefly what you know about the building of this house down there and who, if anybody, was in possession?

Mr. JOHNSON: We object to the latter part of the question.
COURT: The possession is to some extent a conclusion.

Q. State in regard to the building of this house, what was done?
A. Well, Mr. H. O. McDaid was attorney for all parties concerned.
Q. How long has Anna R. Kean upon the whole claimed to be the owner of this land in litigation?

Objected to by counsel for the plaintiff.

Ans. I think the abstract shows; from the first she has been.

Objected to.

Q. Do you know whether or not Mr. Forsyth had personal and actual knowledge of Mrs. Kean's claim to this land?

Objected to by plaintiff.

Q. What did she do as to asserting title to that land against Mr. Forsyth?
A. She received deeds.
Q. Did she give Mr. Forsyth any notice?
A. Yes; in various ways.

Objected to.

Q. Did you ever give him notice in writing?
A. McDaid did as our attorney.

Objected to.

Q. State what was said with reference to Mr. Forsyth as to any act done by your wife or by any one that had authority to represent her with reference to communicating her claim of title to Mr. Forsyth? Look at the paper now shown you and tell me what it is.
A. It is a notice to Mr. Forsyth from Anna R. Kean, dated February 9, 1888.
Q. What was done with the notice?
A. It was sent to him.
Q. How?
A. I think it was delivered by the proper officer.

Mr. FENNELL: I now offer the paper in evidence. It shows that it was read by the proper officer—somebody who was sworn.

417 Mr. JOHNSTON: There is no proof that it has been served on Mr. Forsyth.

COURT: Who signed that?

A. Mr. Long as her attorney at that time.

COURT: Do you know whether she was cognizant of that paprr that was signed?

A. Yes; she knew about it.

COURT: What did she say about it?

A. I don't remember what she said.

COURT: Who was signed for?

A. Mrs. Kean.

Mr. FENNELL: I ask you to look at the handwriting and tell me whose writing that is.

A. John T. Long's.

Q. Take the body of it.

A. John Culver's handwriting.

Q. What relation had John Culver in regard to this land?

A. He had charge of the detail part of it.

Mr. JOHNSTON: That purports to be served on Forsyth seven years after he parted with the title.

COURT: I will let in that portion of the evidence which shows that it was placed in the hands of a certain person to be served. I exclude that portion of Mr. Forsyth being served.

Q. I will ask you to state if at any time prior to that and if so when? Mrs. Kean or any one for her, within your knowledge, asserted title to this land.

Objected to by plaintiff.

Q. State what she done, if she done anything in asserting title?

Objected to by plaintiff and the court overruled the objection.

Ans. From time to time I advanced money for fences.

COURT: What did she do about stating to any one that she owned it or anything of the kind?

A. She gave Mr. Kreuter a lease for the property. Mr. Kreuter has many times every year asserted her title.

418 Q. To your knowledge directly?

A. Yes, sir; to my knowledge from him to me directly—from him to me.

Objected to by plaintiff.

Q. I will ask you to state if you were general agent of Anna R. Kean?

A. Yes, sir.

Q. Did you have full power to represent her in connection with that land?

A. I did.

Q. State what you did as her agent?

Objected to by plaintiff.

Assertion of Title by Kean Admitted.

Mr. FENNELL: Is there any question about their during all those years having asserted title to this land?

Mr. JOHNSTON: I don't know that there is not.

COURT: Let us assume it then.

Cross-examination of Kean.

Cross-examined by Mr. JOHNSTON:

Q. You are an ex-banker now of Chicago?
A. Yes.
Q. What is your business?
A. I am dealing in municipal bonds.
Q. Where is your office?
A. United States Express building.
Q. You say she knew of that notice?
A. She knew of it as she knew of all matters. She knew Mr. Long——
Q. You think that is the way she knew it?
A. That is the way she knows matters in general.

Mr. FENNELL: We now offer this notice in evidence.

And thereupon the notice to Mr. Forsyth was read in evidence, and the same is as follows:

419 *Notice to Forsyth.*

STATE OF INDIANA, } ss:
Cook County, }

To Caroline M. Forsythe and Jacob Forsythe, 1915 Michigan avenue, Chicago:

Take notice that you are trespassing upon my lands by building or causing to be built a certain fence on or near the line of section seven (7) and section eighteen (18) in township thirty-seven (37) range nine (9) in the new survey in Lake county, State of Indiana and you will therefore desist from building the same and remove said fence as I have the legal and equitable title to said real estate and the lawful possession of the same in said section.

ANNA R. KEAN,
By LONG & HUTCHINSON,
Her Attorneys.

Chicago, Feb. 9th, 1888.

STATE OF INDIANA, } ss:
Cook County, }

O. B. Knight, being duly sworn, deposes and says that he is of the age of twenty-one years and upward and a resident of said county and State and that he served the within notice on the within-

named Jacob Forsythe by delivering to and leaving with him a true copy thereof, the 9th day of February, 1888.

Also upon Caroline M. Forsythe by leaving a true copy thereof for her at her usual place of abode with Jacob Forsythe, a member of her family, a person of the age of ten years and upwards at the same time informing her of the contents thereof this 9th day of February, 1888.

O. B. KNIGHT.

Subscribed and sworn to before me this 19th day of February, 1888.

[SEAL.] JOHN M. HUBBARD,
Notary Public.

(Notice of trespassing. Anna R. Kean *vs.* Caroline M. Forsythe and Jacob Forsythe. Long & Hutchinson, her att'ys.)

420 *Testimony of Wm. Krimbill.*

WILLIAM KRIMBILL, a witness for plaintiff, being duly sworn, testified as follows:

Examined by Mr. JOHNSTON:

Q. You may state if you were at one time treasurer of Lake county?

A. I was.

Q. For what years?

A. I took the office in 1879 and left it in August, 1883.

Q. Are you acquainted with lots 3 and 4 in section 18 township 37 range 9?

A. Only as they appear on the tax duplicate.

Q. As they appear on the tax duplicate?

A. Yes.

Q. You went in the office in August, 1879?

A. Yes.

Q. During the time you were in the office who paid the taxes on those lots?

A. I think for two or three years a man by the name of Peterson paid them.

Q. Do you know who he paid for?

A. He paid for the insurance company—the Northwestern of Milwaukee, who held a mortgage. He acted for that company and he paid the taxes on them.

Q. Who paid for 1880 and 1881?

A. I could not say as to that yet I think Peterson did.

Q. You may state if they were sold for taxes during any of the time while you were treasurer.

A. No; they were not sold.

Q. Take lots 1, 2, 3 and 4 and the southeast quarter of the northeast quarter and the southeast quarter of section 19, who paid the taxes?

A. Mr. Peterson paid on all those lands.
Q. Just the same as the others?
A. Yes.
Q. Well, we will go to lots 3 and 4 and lots 1 and 2 in sections 12 and 13; lots 2 and 3 of the northwest quarter of the southwest quarter and the southeast quarter of the southeast quarter, who paid those during that time?
A. They were paid during the same time the same as the others.
Q. Were any of those ever sold for taxes?
A. Not while I was treasurer.

Cross-examined by Mr. FENNELL:

Q. Who paid the taxes on lots 7 and 8 in section 18?

Mr. JOHNSTON: We object. They are going now into the lake. We claim that is not cross-examination in the first place; and in the second place when we paid on the lots according to the
421 Government survey we have paid all there is to pay on that part.

Q. I will get at it in another way. Where are lots 3 and 4? In what section?
A. I could not say. All I know about it is by the section. They paid on sections.
Q. According to your tax duplicate were there any other lots in the southeast quarter of section 18, other than lots 3 and 4?
A. I could not answer.
Q. But you remember particularly about 3 and 4?
A. They were in that section.
Q. Don't you know that lots 7 and 8 of that same quarter are on the same books from which you testify?
A. No.
Q. You haven't refreshed your memory by that?
A. No; only sections.
Q. Except lots 1, 2, 3 and 4 in sections 19, what other lots were on your tax duplicate in that section?
A. That I could not say. I know by sections.
Q. I am asking you by sections. What other lots on your tax duplicate by sections?
A. I don't know; I could not testify to that.
Q. State whether or not you know there were other lots in those sections?
A. I don't know.
Q. I will ask you by virtue of your oath if any of the bed of those lakes were on your tax duplicate.

Objected to by plaintiff.

COURT: I can only conceive that this is properly for no other purpose than merely to test the recollection of the witness.

Mr. FENNELL: If that same book from which he testifies shows that a portion of the land in controversy was assessed in another description and that other parties paid taxes on it——

COURT: You are not entitled to the contents of the record.

Q. I ask you if any other portion, according to your recollection,—as to whether you remember that any other portion of those sections were on your tax duplicate in any other description?

A. I could not state as to that.

422 Q. I will ask you to look at your map and tell me from your recollection if Peterson ever paid any taxes on the bed of either of those lakes?

Objected to by counsel for plaintiff on the ground that it is not cross-examination. That would be a conclusion of the witness anyway as to where the lots run to.

COURT: I will permit him to ask as to whether he paid specifically upon the bed of the lake.

Q. You may answer.

A. That I could not state. I don't know whether he did or not.

Q. What did you say your official position was?

A. I was county treasurer.

Q. You had charge of the tax duplicates of your county?

A. Yes, sir.

Q. Do you know whether the bed of Wolf lake was surveyed and assessed for taxes and extended on your tax duplicate at any time?

Objected to by counsel for plaintiff and the court sustained the objection on the ground that it is calling for the contents of a tax duplicate.

Q. Did your tax duplicate show any other land assessed in this section?

Objected to by counsel for plaintiff and the court sustained the objection.

Q. Do you remember of any other person paying taxes on any portion of this section?

A. I do not.

423 *Testimony — J. P. Merrill.*

JOHN P. MERRILL was the next witness in behalf of the plaintiff, and being duly sworn, testified as follows:

Examined by Mr. JOHNSTON:

Q. What was your official position in Lake county, if any, from August 1883 to 1887?

A. County treasurer of Lake county.

Q. You are acquainted with Mr. Jacob Forsyth?

A. I am.

Q. Can you tell me who paid the taxes on——

COURT: Could you describe them simply as lots which are numbered and rim lots about the rim of those two lakes?

Mr. JOHNSTON: The trouble is much of it did not belong to Forsyth.

Q. Do you recollect who paid the taxes on lots 3 and 4 of section 18 township 37 range 9 during those years?

A. I could not tell who paid them—the parties; they were paid in the name of the East Chicago Improvement Company.

Q. Who paid them on lots 2, 3 and 4 and the southeast quarter of the northeast quarter and the southeast quarter of section 19 in township 37 range 9?

A. The same party.

Q. Lots 3 and 4 of section 12 and lots 1 and 2 of section 13 in township 37 range 9, and the northwest quarter of the southwest quarter and the southeast quarter of section 24 township 37 range 10?

A. They were paid by the same party at the same time.

Q. Were any of them ever sold for taxes?

A. Not during my term of office.

Cross-examined by Mr. WOOD:

Q. You are speaking about the lands around the rim of those two lakes. You recognize the lakes marked on this map don't you?

A. Yes.

Q. Can you see the lots that those taxes were paid on?

COURT: I suppose the only question is whether they paid specifically on the lake bed.

A. Not as I know of,—only described in those lots I testified to.

424 Q. Well those lots that they paid taxes on bordered on the lake.

A. I could not say.

Q. You are confident that they did not pay taxes on the bed of the lake?

The COURT: He has already stated they did not pay specifically on the bed of the lake.

Q. Were you at that time familiar with that country?

A. No; I was not.

Q. You could not tell—draw a line between the water's edge and the meander line?

A. No.

Q. You don't know anything about that?

A. No.

Testimony — W. L. Allman.

WALTER ALLMAN, the next witness for the plaintiff, being sworn, testified as follows:

Examined by Mr. JOHNSTON:

Q. You are an abstracter at Crown Point?
A. Yes.
Q. I believe you are a banker, too?
A. Not yet.
Q. Did you ever pay taxes for Mrs. Forsyth?
A. Yes; several times.
Q. Do you recollect when?
A. No; I could not say positively what years I paid for. I refreshed my recollection by referring to the books.
Q. That was prior to 1881?
A. No, I think I never paid prior to that time.
Q. Did you pay after that?
A. It might have been before. I could not say positively whether we paid before 1881 or not.
Q. When did you pay—you may state whether or not you paid on those lots in sections 18 and 19?

COURT: Is there any controversy but what the plaintiff and his grantors paid the taxes which were assessed against these lots which are numbered about the rim? And on the other hand I suppose your people, some of them, paid taxes on the lake bed under this new survey.

425 Mr. JOHNSTON: That is the fact about it.

Mr. WOOD: I don't think there is any controversy about that.

Mr. JOHNSTON: Then it is admitted that the plaintiff and its grantors under whom it claim- title to those lots paid the taxes from 1870 up to 1891 on all the lots which are numbered around the rim of the lakes, according to the descriptions that have been given.

Mr. FENNELL: That will be admitted—to the rim of the lake.

COURT: They paid on the lots numbered about the rim of the lake.

Mr. FENNELL: And the defendant paid the taxes on the lots numbered in the bed of the lake.

COURT: Yes, claiming under the new survey, it being in reality a question as to the validity of the title to the property.

Mr. JOHNSTON: Yes; that is right.

The plaintiff next read in evidence the depositions of Frederick C. Rossiter, Jacob Forsyth and Oliver Forsyth, which are respectively in the words and figures following:

426 *Deposition of F. C. Rossiter.*

STATE OF INDIANA, } ss:
Porter County, }

In the Porter Circuit Court, October Term, 1895.

CALUMET CANAL & IMPROVEMENT COMPANY
vs.
CHARLES B. ALEXANDER, HENRY B. MASON, ANNA R. KEAN, Samuel A. Kean, *et al.*

The defendants in the above-entitled cause are hereby notified that on the 26th day of September, 1895, at the office of W. O. Johnson, 803 The Rookery, La Salle street, city of Chicago in the county of Cook and State of Illinois, between the hours of 8 o'clock a. m. and 6 o'clock p. m., of said day, before some officer authorized to take depositions, the plaintiff will proceed to take the depositions of Frank E. Rossiter, Edward Roby, witnesses to be used in evidence on the trial of said cause, and will, if necessary continue said taking from day to day until said depositions are completed.

Dated this 17th day of September, 1895.

W. O. JOHNSON &
WILLIAM JOHNSON,
Att'ys for Plaintiff.

We acknowledge service of the above notice, and waive dedimus and certificate of official character of officer before whom said depositions are taken, this 17th day of September, 1895.

W. C. McMAHAN,
THOS. J. WOOD,
Att'ys for Defendant Mason.

____ ____,
Att'y for Annie R. Kean et al.

427 The deposition of Fred C. Rossiter, witness, produced and sworn to before me, a notary public, at Chicago, in Cook county, State of Illinois, on the twenty-sixth day of September, 1895, pursuant to the enclosed notice.

This deposition was taken on the part of the plaintiffs in a certain action now pending in the circuit court of Porter county, in the State of Indiana, wherein Calumet Canal and Improvement Company — plaintiffs, and Charles B. Alexander, Henry B. Mason, Annie R. Kean, Samuel A. Kean *et al.* defendants.

The said FRED C. ROSSITER being duly sworn to testify the truth, the whole truth and nothing but the truth relating to said cause, deposes as follows:

Q. State your name, age, residence and occupation?

A. Age 51, residence Chicago, occupation is surveyor and civil engineer.

Q. How long have you been a surveyor and civil engineer?
A. Twenty-eight years.
Q. How long have you lived in Chicago?
A. Twenty-eight years.
Q. Are you acquainted with sections 18 and 19 in township 37, north range 9, and the south half of sections 12, section 13, and section 24, in township 37 north of range 10, west of Lake county, Indiana?
A. Yes sir.
Q. You may state whether or not you are acquainted with that country generally?
A. Yes sir.
Q. How long have you been acquainted with it?
A. Since 1876.
Q. State whether you are acquainted with Wolf lake and Lake George?
A. Yes sir.
Q. You may state whether or not you have ever done any of these lakes?
A. Yes sir; probably from fifty to sixty days on the lakes.
Q. When was that?
A. Since 1874.
Q. What time did you commence in 1874?
A. It was late in the fall or winter.
Q. Describe the character of these lakes?
A. They are low partly grown over with grass, wild rice and the banks on the land adjoining are low flat lands.
Q. How large are the lakes?
428 A. Well, Lake George, I should say was a little over half a mile wide by nearly two miles long, perhaps a little more, and Wolf lake in Indiana, is nearly a mile wide in one place. I think it would average about three-quarters of a mile in width and including the northern neck, sometimes called Wolf river, it would be nearly four miles long or three and one-half.
Q. Do you know when the last land around the lakes was first surveyed?
A. I can give you the date by my field-notes here.
Q. Well, if you can tell when by memory?
A. About 1834 or '35.
Q. Which lake lies to the east?
A. Lake George.
Q. What portion, if any, of the south half of section 18 and 19, township 37, range 9 are in the lake?
A. Without referring to any map, I should say about half of section 18; of section 19, same township, the north half would be of the section 19, a little over half in the lake, of the south half—perhaps a quarter or one-third.
Q. Now take section 12, township 37 north of range 10 west the south half of that, what portion is in the lake?
A. I should think three-fourths of it.
Q. Section 13?

A. More than three-fourths.

Q. Section 24?

A. Well, I should think the north half might be the half in the lake. All of these answers are given from memory, without referring to any map.

Q. Now, state again what is the character of the lake, its bed, etc.

A. The soil under the bed, or under the lake is sand in most places. I think it was originally entirely sand—some decayed vegetation. There are portions of it now that are covered with soil, perhaps one-third, or less than one-third of the lake—maybe not over one-eight is grown up with weeds and coarse grass, wild rice and it is naturally flat, that is, it is not very deep.

Q. How about the shores?

A. The margin of the lake, the land is very flat, but little banks.

Q. What is the depth of these lakes?

A. The average depth is about 3 or 3½ feet.

Q. Can you tell what the depth of the lake is at the deepest part?

A. There is a place in the northern end of Wolf lake that is 17 feet deep.

429 Q. Where is that point, where it is so deep?

A. Near the northern end of the lake, which is sometimes termed Wolf river. The northern three-quarters of the lake in the channel will average about nine feet in depth; in the body of the lake proper that portion that is never called river, I think the deepest place is 6½ feet in the average water.

Q. When did you see the lake first?

A. I cannot tell when it was exactly, but before the fire 1871.

Q. When did you last see it?

A. About two months ago.

Q. What are its surroundings—what kind of land is around it?

A. It is a sandy-covered land with a thin coating of soil, in places covered with timber, ridges and sloughs; the ridges are not very high; the general lay of the land adjoining the lake is flat and low.

Q. What kind of vegetation as to weeds and grass?

A. Wire grass and a few weeds.

Q. What kind of timber was this around it?

A. Well, it would be poor timber—short.

Q. I mean as to oak, hickory, etc.?

A. It is mostly what they call scrub oak, poplar, birch, some hickory and maple.

Q. What about the shore lines, state whether they are reasonably well defined or not?

A. They are not except in a few places.

Q. How is it around the south half of section 18?

A. It is not well defined there.

Q. Section 19?

A. A portion of it is a little better defined on 19 than the general

lay of the land. There is a few hundred feet east of the lake proper, quite a strong, high ridge.

Q. How is the shore of the lake as to being sandy or otherwise?

A. General sandy.

Q. Now, state whether or not at high-water mark there is on the east side of Lake George a ridge?

A. Yes sir.

Q. What about the permanence of the lakes?

A. They are permanent lakes and can never be dried except by artificial means.

Q. State whether it has been about the same since you have
430 known those two lakes.

A. Yes sir; take it year after year, the average has been about the same except for the last two or three years, a little drier perhaps on account of a permanent opening being made into Lake Michigan, but it is an indirect opening If it was a direct opening, it would leave the lakes in a permanent condition.

Q. Where is the opening?

A. It is into the Calumet river in the western portion of Wolf lake in Illinois, some three, four or five miles away from Lake Michigan.

Q. State whether or not the last three seasons have been unusually dry?

A. Yes sir.

Q. Can you tell what the difference is between the ordinary year and low-water mark of these lakes?

A. About two feet.

Q. What, if anything, do you know about a deep place about opposite the center of section 18?

A. Well, I think there is a very deep place but it is partly filled with soft mud; it is in the western portion of the lake, I think about seven or eight feet deep; it is what we might call soft bog.

Q. I understand from you that you have made surveys there?

A. Yes sir.

Q. And know these things of your own personal knowledge?

A. Yes sir.

Q. You may describe Wolf river?

A. The Wolf river connects with Wolf lake about the northern line of section 12 and runs nearly straight north to the northern line of section 1 and to within five or six hundred feet of Lake Michigan. At times this connection is open with Lake Michigan and other times it is closed up by the sea on the lake.

Q. Have you seen this place, where Mrs. Kean had her shanty, where is it?

A. My recollection is that it is about from 100 to 250 feet north of the northern line of the south half of section 18; township 37, range 9 on the east shore of Lake George.

Q. How far from the water?

A. Many times the water surrounds the house and is under the house and runs, two, three or four hundred feet east of the house. It is about 20, 30 or 40 feet from the water in its ordinary state.

Q. Where is it with reference to the meander line of the Government survey of 1834 or '5?

A. I think it is about 30 or 40 feet west.

431 Q. What connection does Lake George have with the other lake?

A. It has an artificial connection with Wolf lake on the western side and when the water is high in both lakes, it has a natural connection.

Q. With what?

A. With Wolf lake.

Q. And where, if at all, do these lakes empty their surplus water?

A. In Lake Michigan.

Q. Through what channel?

A. In early years, up to 3, 4 or 5 years ago, through Wolf river directly into Lake Michigan; since that time they empty into the Calumet river from the western portion of Wolf lake in the State of Illinois.

Q. Can you tell about what this lake was in 1834 and '5 during the Government survey, from observation and from your knowledge of them?

A. I think that the water at that time from all that I can judge by the surroundings was above the average stage of water since I have known them.

Q. How much would you say?

A. Six inches to a foot, I should say.

Q. What effect, if any, does the height of water in Lake Michigan have upon these lakes?

A. I should say that the water in Lake Michigan has no effect on the water in these lakes; if the mouth of Wolf river is open, it would then affect the water as long as it remained open; but the first high sea on the lake closes its mouth and then it has no effect again until it is opened.

Q. State whether you have had experiences in other bodies of water like these?

A. To some extent, although more on these two lakes than any other.

Q. Now, take it from your experience, you may state what is the fact, whether or not Lakes George and Wolf are permanent lakes?

A. I have taken soundings in both of these lakes and in Wolf lake in Illinois as well, and connected them with Lake Michigan and know the rise and fall of Lake Michigan and know that the bed of both of these lakes is lower than the lowest stages of Lake Michigan.

Q. What kind of a house is this Kean house?

A. It is a one-story, a little longer than it is wide, I should say, 14 wide by 20 feet long and built of boards set up and down with batons over the cracks.

432 Q. Now, can you tell us where this house or shanty is with reference to the center line of the section running north and south?

A. It is east of the north and south section line.

Q. You say it is east of it.
A. Yes, sir.

Cross-examination of F. C. Rossiter.

Cross-examination by Mr. WILLIAM P. FENNELL:

Q. Were Wolf lake and Lake George ever one lake?
A. I think not.
Q. Are you the same F. C. Rossiter who testified at Crown Point, Ind., in a case of Roby *vs.* Kean?
A. Yes sir.
Q. Do you remember hearing Edward Roby swear that that strip of land dividing Wolf lake from Lake George was originally a beaver dam?
A. I cannot say positively, although I have heard it, and maybe through his testimony; I would not say positively.
Q. You have heard, however, that statement?
A. Yes sir.
Q. Do you believe it?
A. That would be a little question, because I am not sure what is meant by a beaver dam. If that should be taken literally I should say no, but there is a ridge running between the two lakes often called Beaver dam, the ridge must be two miles long and I think would average about 12 feet in width; maybe three feet high, in places, it is a great deal higher than that and some places not so high; in one place in section 24 there is no ridge or dam at all.
Q. Well, if this ridge was originally a beaver dam, then before this dam was made, it must have been all one body of water?
A. In high water it would be all one body of water; in low water, it never has been one body of water; in average stage of water, I hardly think it would be one body, but I would not say positively.
Q. Then assuming that any time of year it was one body of water, then lot 1 and 2 of section 13 must have been originally made by beavers?
A. No sir, I think not. In the first place my explanation of the word beaver dam there was intended to convey the idea that I do not believe that beavers were ever there to make the dam. I do not think it is the kind of dam that the beavers would make and that the dam opposite to section 13, the north half of section
433 13 would not touch section 13; it would have crossed the south half of section 13. I do not know sure without looking at a plat, whether it would touch the south half of section 13 or not. After looking at the map I see that my mind was upon section 12 (the east line instead of section 13), that the beaver dam would be along the eastern edge of section 13. The whole line, that is the beaver dam, would run from the north line to the south line of section 13.
Q. And you think in time of high water that the dam was covered?
A. I hardly think that the dam itself was ever covered with water (as it stands there today) by high water. There is a portion through

the central part of the north half of section 24, where there is no beaver dam, that in high water would be entirely covered. The strip of land between the lakes would be almost entirely covered except that beaver dam.

(Signed) F. C. ROSSITER.

434 STATE OF ILLINOIS, } ss:
Cook County, }

I, R. E. Gross, a notary public within and for said county, hereby certify that the above Fred C. Rossiter was by me first duly sworn according to law, to testify the truth, the whole truth, and nothing but the truth, relating to said cause; that his *deponent* — reduced *to* me *by* writing, that the said Charles B. Alexander, Henry B. Mason, Annie R. Kean, Samuel A. Kean *et al.* attended by William P. Fennell, their attorney, and said deposition was taken in room 801, the Rookery in Chicago, county of Cook, State of Illinois on the 26th day of September, 1895, between the hours of 8 a. m. and 6 p. m. of said day.

In testimony whereof, I have hereunto set my hand and notarial seal, this first day of October, 1895.

[SEAL.] R. E. GROSS,
Notary Public.

435 The depositions of Jacob Forsyth and Oliver O. Forsyth, witnesses produced and sworn *to* before me, Harry F. Lee, a notary public in and for the county of Cook, State of Illinois, on the tenth day of September, 1895, pursuant to the enclosed notice.

These depositions are taken on the part of the plaintiff in a certain action now pending in the Porter circuit court, of Porter county, in the State of Indiana, wherein Calumet Canal & Improvement Company is plaintiff and Charles B. Alexander, Annie R. Kean, Samuel A. Kean and *George* B. Mason, *et al.* are defendants.

The said JACOB FORSYTH, being duly sworn to testify the truth, the whole truth and nothing but the truth relating to said cause, deposes as follows:

Deposition of Jacob Forsyth.

Direct examination by Mr. JOHNSON:

—. State your name, age, residence, and occupation.

A. Jacob Forsyth, 74 years of age; 1915 Michigan Ave., Chicago, Illinois; managing land in Indiana.

Q. Are you the husband of Caroline M. Forsyth?

A. Yes, I am.

Q. Are you acquainted with Annie R. Kean, the wife of Samuel A. Kean?

A. I do not know her.

Q. State if your wife formerly owned sections 18 and 19 in town-

ship 37, north, range 9 west, in Lake county, and sections 12, 13 and 24 in township 37 north, range 10, west, in Lake county.

Objected to by Mr. Fennell as not being the best evidence.

A. Not all of 18; only part of it.
Q. What part?
A. The south half.
Q. How was it as to the other sections?

Same objection by Mr. Fennell.

A. 19 she owned; also 13 and a part of 24.
Q. State whether or not she owned section 12.

Same objection by Mr. Fennell.

A. Yes.
Q. This is the land she conveyed to William W. Green on November 10, 1881?

Same objection by Mr. Fennell.

436 A. Yes.

Adjourned until September 11, 1895, at ten-thirty o'clock a. m.

SEPTEMBER 11, 1895—10.30 o'clock a. m.

Parties met pursuant to adjournment.

JACOB FORSYTH—Examination resumed by Mr. JOHNSON:

Q. Who paid the taxes on this land prior to the conveyance to William W. Green on November 10, 1881?

Objected to by Mr. Fennell as not being the best evidence.

A. Mrs. Forsyth.
Q. Who, if any one, acted as her agent in making these payments?
A. I did.
Q. Who paid them for the years 1880 and 1881?
A. I couldn't tell you; it might have been Green for 1881.
Q. Who paid them for 1880?
A. I believe I did.
Q. And for the prior years?
A. I did.
Q. For whom?
A. For Mrs. Forsyth.
Q. You are acquainted with lots 3 and 4 of the survey of 1835, section 18, town 37, range 9, Lake county, Indiana, are you not?
A. Yes, sir.
Q. Who paid the taxes for those lots for the year 1880 and prior years?
A. Mrs. Forsyth.
Q. Are you acquainted with lots 2, 3 and 4 survey of 1835, section 19, township 37, range 9?
A. Yes, sir.

Q. Who paid the taxes on those lots for the year 1880 and prior years?

A. Mrs. Forsyth.

Q. Are you acquainted with lots 3 and 4, survey of 1834, section 12, township 37, range 10?

A. Yes.

Q. Who paid the taxes on these lots for the year 1880 and prior thereto?

A. Mrs. Forsyth.

Q. Are you acquainted with 1 and 2, survey of 1834, section 13, township 37, range 10, in Lake county, Indiana?

A. Yes, sir.

Q. Who paid the taxes on those lots for the year 1880 and prior years?

A. Mrs. Forsyth.

437 Q. Are you acquainted with lots 2 and 3 in section 24, township 37, range 10, Lake county, Indiana?

A. Yes, sir.

Q. Who paid the taxes on these lots for the year 1880 and prior thereto?

A. Mrs. Forsyth.

Q. State whether or not you were her agent during all those years?

A. Yes.

Q. State as a matter of fact who actually made the payments?

A. Well, it all went through my hands.

Q. You saw the payment of them?

A. I saw to the payment of them.

Q. You may state whether or not you know of your knowledge that the taxes were actually paid on this property for the years 1880 and prior years?

A. Yes I know it.

Q. Can you state whether you or Mrs. Forsyth paid the taxes for 1881 on this property?

A. I said that it might have been Mr. Green.

Q. How long have you known this land?

A. Since 1860.

Q. At the time of the conveyance by yourself and Caroline M. Forsyth, your wife on November 10, 1881, to William W. Green, who, if any one, was living upon or in possession of this land?

A. Nobody was living on it.

Q. State whether or not there were any fences on these lands at that time, in these sections that I have named?

A. No.

Q. State whether or not there were any houses or buildings upon these sections I have named, at the time of the conveyance to William W. Green?

A. No.

Q. You are not acquainted with Annie R. Kean?

A. No.

Q. Are you acquainted with her husband, Samuel A. Kean?

A. No, I could not say that I was; I have seen him, I believe, but I don't know whether I would recognize him now, I think I would, though.

Q. You may state whether they or either of them were living upon the premises or had any improvements on them at that time?

A. No.

Q. State whether or not there was anybody representing them on the premises at that time?

A. No, sir.

Q. Do you know Mr. Kreuter?

A. Yes, sir. There are two brothers of that name.

438 Q. That is Charles Kreuter.

A. I know him.

Q. State whether he was living on these premises at that time?

A. No, sir; he was not.

Q. State whether at any time since you have known the lands Annie R. Kean or Samuel A. Kean lived upon the lands?

A. No, they never did.

Q. State if any one was living upon the premises, or has lived upon them since you knew the land, claiming to act through or under Annie R. Kean or Samuel A. Kean?

A. No sir, there never was.

Q. What, if anything do you know about the meander lines upon these sections?

A. Yes, I know something of them.

Q. State whether or not during the time since you have known these lands in 1860 anybody has resided upon these sections between the meander lines and the lake?

A. The first is section 18, you say?

Q. Yes.

A. South half?

Q. Yes?

A. No.

Q. Now take 19, state whether or not anybody has resided between the meander lines as established by the Government survey and the lake?

A. Yes, there was a man named John A. Smale, lived in section 19, between the meander lines and the lake.

Q. What became of him?

A. Well, he trotted off to Wisconsin; I think he is dead.

Q. How long did he stay there and when did he leave?

A. Oh, I don't remember, he stayed there until Judge Drummond and Gresham made a decree against him, or in favor of Mrs. Forsyth.

Q. Then he staid there, as I understand from you, until he was ousted by the decree of the Federal court?

A. Yes sir.

Q. Did anybody follow him in possession there?

A. I am not positive at this moment whether there was or not. There was a man on there in connection with those people in section 7, and I have a sort of an impression that he went there for a short period after Smale left, but I am not positive about that.

Q. How long has it been since any one lived there on that meander, between the meander line and the lake?

A. Well, that would be at the time of the decree; the decree will show the date; I cannot remember the date now.

439 Q. Supposing that was in 1879, was there anybody in possession after that?

A. No.

Q. Did anybody live there, anybody build any fences there after that?

A. No.

Q. Or do any other kind of work there?

A. No.

Q. Take section 13, or more particularly known as lots 1 and 2, survey of 1834 section 13, township 37, range 10?

A. Yes, there was a man at one time, but exactly what year he lived there, I don't know; a man named Reid, a justice of the peace, over somewhere in the country.

Q. How long has it been since he was there?

A. He left there, I think, before the decree was entered.

Q. The decree against Smale in the United States circuit court?

A. Yes.

Q. Has there been anybody residing on those premises since between the meander line and the lake?

A. No.

Q. Nobody built any houses, fences, or cut timber, or done anything else there?

A. No; O, there might be people stealing there.

Q. Now take lots 3 and 4, survey of 1834, section 12, township 37, range 10, who, if anybody, has resided upon them since you have known them?

A. Not any one, except a man named Felt; how long he was there, I don't know, at this moment I could not remember how long he remained on the ground.

Q. What lot do you say he was on?

A. Lot 4; he claimed to be south of the south line of lot 4.

Q. But as a matter of fact where was he?

A. Well, I really never surveyed it to ascertain the fact.

Q. Where was he with reference to the meander line and the lake?

A. It was very close to the meander line.

Q. When did he leave there?

A. Well, he left there I think at a pretty early date.

Q. When did he leave there with reference to your sale of the lands to William W. Green, November 10, 1881?

A. O, it was long prior to that.

Q. Who, if any one lived on the premises after that?

A. No one.

Q. Who, if any one, built any fences or houses on them after that?

A. No one.

440 Q. Or did any plowing or anything of that kind?

A. No one.

Q. Are you acquainted with lots 1, 2 and 3 in section 24, township 37, range 10?

A. Yes.

Q. Who, if anybody, has occupied these lots since 1860?

A. No one has occupied the lots, but there was a man who pretendled to belong to the noble army of squatters, that lived on the marggin of Wolf lake, at the State line.

Q. Do you recollect his name?

A. No.

Q. How long did he live there?

A. Well, I don't know.

Q. How long since did he leave?

A. O, he has gone long ago.

Q. When did he leave, with reference to the conveyance by yourself and wife to William W. Green?

A. Well, he was not there then.

Q. You may state whether anybody has been there since then?

A. Not that I know of.

Q. Who was in possession of these lands at the time of your and your wife's conveyance to William W. Green, November 10, 1881?

A. Mrs. Forsyth.

Q. What was she doing with the land?

A. Why, she was paying taxes.

Q. Is that all?

A. Oh, no, she had some animals pasturing there, and also a club; I think sold some grass on some of those lands described in your question.

Q. Do you know anything about these lakes, Wolf lake and Lake George I believe?

A. Yes, sir.

Q. How long is Lake George?

A. I think about a mile, and three-quarters.

Q. How wide is it?

A. About three-quarters of a mile.

Q. How long is Wolf lake?

A. Well, if you take it from the extreme southern end in section 24 to Lake Michigan in section 36, it would be three miles and a halff long.

Q. What part of that distance, if any, is called Wolf river?

A. The mile in section 1, next to Lake Michigan.

Q. How long have you known those lakes?

A. Since 1857.

Q. You may describe them at that time?

A. They were very full of water at that time, much more so than they are today. The outlet of that Wolf lake was then closed up.

Q. Do you know how deep the water was at that time?

441 A. No; the survey made by the United States engineers would show that, but I don't remember exactly what that is; I remember it in parts.

Q. How was it as to navigation at that time?

A. Oh, it was very good water for navigation of certain kind; of course it would not hold a 74-gun ship.

Q. What as to the fact as whether ships did come into it since you have known it?

A. Oh, I don't know of that; I have heard of it, but I don't know it.

Q. How do the lakes compare in size now with what they were when you first knew them, Lakes Wolf and George?

A. Oh, the water is lower because it is lower in Lake Michigan and it will stay low in them as long as the water remains low in Lake Michigan.

Q. What, if anything do you know as to the water receding from the meander line?

A. I can tell you a curious fact about that, for one mile in section 12 the meander line was run of Wolf lake on the ice.

Q. Have you your receipts for which you paid taxes on this land?

A. Well, I expect so.

Q. Would you attach a copy of them for the years 1878, 1879, and 1880 and if you paid the taxes for 1881, a copy of the tax receipt of 1881, and have them marked Exhibit "A"?

A. I will if I can find them.

Q. You know Henry O. McDaid, do you?

A. I did.

Q. Where did he live along about 1880 and 1881?

A. In Chicago.

Q. Do you know whether he had any personal property in Lake county at that time?

A. No, I don't know; I never knew that he did own any personal property in Lake county.

Cross-examination by Mr. FENNELL:

—. In reference to the payment of the taxes, do you remember at this time each particular payment of tax, on what section of land, and when and to whom you paid it?

A. The last question I can answer. It was paid to the treasurer of Lake county.

Q. As to the rest of the question?

A. Well, it was paid on all the lands which Mrs. Forsyth owned at one time.

442 Q. You do not mean it was paid for all the years at once time?

A. O, no, it was paid at the proper time in each year.

Q. Have you any present recollection of each specific payment of those taxes?

A. I do not understand that, in view of the answer I have made already.

Q. When and to whom and what land did you pay the taxes for the year 1881?

A. I didn't say I did pay them.

Q. Or for the year 1880?

A. There were paid at Crown Point, to the treasurer; as to the date it would be most miraculous, I think, if I could remember the day.

Q. Did you pay them to the treasurer in person?

A. Sometimes I did and sometimes ——

Q. I mean in 1880.

A. Well, I cannot tell; sometimes I paid them to the treasurer in person at other times I paid them through Mr. Allman.

Q. Do you remember paying the taxes in person to the treasurer for the year 1879?

A. Oh, no, I don't remember what years I paid them in person; I generally paid them in person.

Q. Under what description did you pay the taxes?

A. According to the United States description.

Q. Of the first survey of 1836?

A. Oh, that was the only survey that I knew, the legal survey; the other is a devil of a fraud, if you will excuse the expression.

Q. Coming to the question of possession, do you know where that cottage was erected on the east side of Lake George by Kean, commonly called the "Kean cottage"?

A. Do I know where it was?

Q. Yes.

A. Yes, I do.

Q. Where was it?

A. It was on the margin of the lake, on the southwest corner of block 2, in that section.

Q. Between the meander line and the lake?

A. O, I don't know anything about that meander line, really it is an imaginary thing anyhow a fiction of the imagination.

Q. When and by whom was that cottage built?

A. I don't know who built it; it was built during the period of that squatter movement.

Q. About what time?

A. O, we will say in the 70's; I cannot now remember the exact date.

443 Q. Was it prior to 1874?

A. Well, I couldn't say it was in the 70's anyhow, that is the nearest I can come to now unless I go to documents, which I can do very readily.

Q. Tell us the history of that squatter movement; tell us all you know about it?

A. Well, there is a good deal of it that I can tell you that I don't know about. The first knowledge I have of it was through an old surveyor in Indiana who had been engaged in what I call getting something for nothing all his life. He was then as poor as Job's turkey—I mean that literally. He died here in Chicago, on Canal street. Now, strange as it may appear, I don't remember his name at this moment; if anybody should happen to name it I could recognize it. A man by the name of Smale attended to him somewhat, or pretended to have done so when this engineer was sick,

and on his deathbed; and among the dead man's papers he found a survey, made by that engineer of the lands and meander lines and so on around Lake George and proceeded to squat, being guided by those field-notes and what other papers there were.

Q. How many of those squatters were there?

A. From first to last?

Q. Yes, sir?

A. Well, as near as I can remember there were six different and distinct ones.

Q. Are you aware that John A. Smale was dead when that decree was entered?

A. Well, I have some indistinct recollection that that was so, but I dont know it; I say that that was the case.

Q. Are you aware that the alleged title to the land occupied by the Smales was in Sarah Smale, and not in John A. Smale?

A. I was not aware of it. Their private matters, of course, I did not know it.

Q. Who first occupied the Kean property?

A. I don't know sir.

Q. Do you remember when Mr. Kean's mother lived there?

A. Well, I remember the fact of her living there, trudging through the heavy sand, an old woman, for years tredging through the heavy sand going down to that cottage, and I said to myself, "Her son is a dam-scamp or he would not permit his old mother, on the brink of the grave to do that sort of thing." That is what I said, and I say it now.

Q. Do you remember when Charles Kreuter moved into that cottage?

A. No I don't know; that cottage, you remember is on the Martin Nolan piece of land lot 2 in section 18.

Q. Has not Charles Kreuter continually occupied that house
444 from the time he first took possession until the present time?

A. Well he might be living a dual life, of course he might but he built a house certainly on the north of section 18 on Mr. Tully's land, bought land from Mr. Tully and has been living there for certainly ten years back.

Q. Has he not furniture and some one living in this Kean property?

A. O, I really don't know; I never nose around in that way, there might have been chickens or dogs or anything else there for all I know

Q. Beginning at the south end of Wolf lake in section 34 have you a fence around lots 2 and 3 in section 24?

A. No sir.

Q. What particular act of possession have you done in reference to those lots?

A. I have made hay there.

Q. When did you last make hay on those two lots?

A. Well, I think it was prior to 1880, the exact year I cannot give.

Q. You must have cut the hay between the center line of the section and the water?

A. What center line, east and west or north and south?

Q. East and west.

A. Yes, parallel with Wolf lake running to the northeast.

Q. In reference to lots 1 and 2 section 13 is there any fence around those lots or either of them?

A. Not that I know of.

Q. What possession have you had of those two lots?

A. Well, we have pastured there.

Q. What grows upon that little neck of land there (indicating on map).

A. A nice growth of trees, next Lake George.

Q. What have you pastured upon those two lots?

A. Domestic cattle.

Q. How many head have you pastured upon those two lots?

A. Oh, I don't know, sometimes I had more sometimes I had less, I couldn't tell you.

Q. Did any other people's cattle come there?

A. O, certainly they have but we have driven them off, repeatedly, but I never have allowed my cattle to go on any man's land.

Q. With reference to lots 3 and 4 section 12 is there any fence around those lots—south half of section 12, I mean?

A. There is a fence on the east side of the range line which divides those lots from the lands east of us in section —.

Q. In what direction does that fence run?

A. North and south.

445 Q. Are there any fences running east and west?

A. Yes, at the south end of lot four there is a fence on the north side of it.

Q. You say at the south end of lot four?

A. Yes.

Q. There is a fence where?

A. That fence runs east to the lake, and therefore it is in section seven.

Q. There is none then in section 12?

A. No, except as I have explained.

Q. With reference to the other lots, are any of them fenced in?

A. Which other lots?

Q. Mentioned by you in your examination-in-chief?

A. In what section?

Q. Well, section 18?

A. Yes, there is a fence there.

Q. Where?

A. At the north end of the section and south a quarter of a mile from east to west and from north to south.

Q. On what side of Lake George is it?

A. On the east side.

Q. What, if any fences are on 19?

A. Well, sir, I believe there is neither a road, fence nor house on it; that is my belief.

Q. Do you remember when a brother of S. A. Kean, lived down there?

A. I have seen a brother of S. A. Kean down there in that immediate neighborhood. As I never saw him in the house, I don't know that he lived there.

Q. At the time of the squatters' taking possession did you make any protest against the survey that was made at that time?

A. You bet I did.

Q. In what manner?

A. In the first place I pulled that fellow Smale's house down, and part of it was and in the next place I went into court in an ejectment suit.

Q. What else?

A. Well, I went then into the United States court. Now, I don't know, I think that is enough for one poor man to undertake.

Q. What United States court?

A. For the district of Indiana, held at Indianapolis.

Q. Against whom?

A. Well, I suppose it was against Smale, I haven't the documents now before me, but I presume that it was—hold on, I have
446 not been through these things—now it begins to dawn on me that there was a woman named Kean married a kind of a crazy man who went to the asylum and died. They lived on the point a little to the south of Smale. The name has slipped my memory.

Q. Did you not contest the approval of that survey before the Interior Department?

A. Yes sir.

Q. Did you not appeal from the decision of the Commissioner of the Land Office to the Secretary of the Interior?

A. I think so.

Q. And nevertheless did he not approve of the survey?

A. General Williamson was the Commissioner of the Land Office at the time that survey was authorized; it was authorized by affidavits made by two perjured men in the neighborhood who swore that it was dry land fit for agricultural purposes that is the fraudulent foundation for the survey, and I believe from information I received from various sources (now you can strike this out if you want to) that the man Williamson was in partnership with those scoundrels.

Q. Did you present those facts before the Secretary of the Interior?

A. Well, I don't know; he was another damned fraud called—what is this his name is? that big German with the big spectacles.

Q. Carl Schurz?

A. Yes, knows as much law as my yellow dog.

Redirect examination by Mr. JOHNSON:

Q. You say there was six squatters on this land?

A. I said there were six distinct squatters.

Q. Now a question Mr. Fennell asked me brings a seventh to my

mind. You may state whether they were all on this land or on the other land?

A. Some of them were on other land.

Q. Can you tell about how many were on this land?

A. Yes.

Q. About how many?

A. Four.

Q. Give us their names as near as you can?

A. Felt, Reid, Smale and this crazy brother-in-law of Kean's here in Chicago.

Q. Now as to the Kean cottage you may state whether that is there or not?

A. I don't know sir, I have not been out there for a long time.

Q. What, if anything, did you ever do to assert title for your wife as to this land?

A. What land?

447 Q. Where the Kean cottage was?

A. I had nothing to do with that.

Q. Where was that?

A. I have said it was on lot 2, section 18, belonging to Martin Nolan.

Q. State if that is where Kreuter resides if you know?

A. I don't — of his ever residing there.

Recross-examination by Mr. FENNELL:

Q. What did Kreuter do with reference to occupying or using these lakes while he lived in that cottage?

A. I don't know about his living in that cottage.

Q. Well, at any time?

A. He is all the time occupied in trespassing over other people's lands to get on to the lake to fish and to shoot duck.

Q. Has he not kept a number of boats there for hire?

A. Why of course, he is living without doing anything.

Q. And made his living renting boats to other people?

A. Yes, renting boats tied up to Mrs. Forsyth's land.

Redirect examination by Mr. JOHNSON:

Q. About when did Kreuter first come there?

A. Well, sir, Kreuter has been in that neighborhood of the lake for so many years back that I can't remember when he first came there.

Q. You may state whether he ever lived on any of this land that we have been taking testimony about?

A. He did; he was my tenant on lot 1 of section 19.

Q. When was he your tenant there?

A. O, that was a great many years ago; it was in the early seventies.

Q. But I understand from you that he was not on any part of this land at the time of the making of this land to Green?

A. Not at all.

Q. Where did you and your wife reside at the time you conveyed the land named in this deposition to William W. Green?

A. In Sheffield, Lake county, Indiana.

448 Q. What personal property did your wife at that time have in the county of Lake and State of Indiana? Give the description of it as near as you can, household, live stock and everything else.

A. Our house had ten or twelve rooms furnished; she had horses, cattle and sheep, how many of each, I don't know, and agricultural implements, plows, harrows, mowing machines etc.

Q. What personal property, if any did she have in Lake county, Indiana throughout the months of February and March, 1882? Give a description of it whether household, live stock or otherwise?

A. My answer to the last question will have to stand as my answer to this one.

Q. What was the value of this property. State as near as you can.

A. About $5,000, I should think; it might be more.

JACOB FORSYTH.

449 OLIVER O. FORSYTH, being duly sworn to testify the truth, the whole truth and nothing but the truth relating to said cause, deposes as follows.

OLIVER FORSYTH.

Direct examination by Mr. JOHNSON:

Q. State your name, age, residence and occupation?

A. Oliver O. Forsyth, 35; Chicago, dealer in real estate.

Q. You may state whether you are the son of Jacob and Caroline M. Forsyth?

A. Yes, sir, I am.

Q. Are you acquainted with lots 3 and 4 in section 18, township 37, range 9, Lake county, Indiana?

A. Yes, I have gone over there a great many times.

Q. Do you remember the circumstance of your father and mother making a deed to William W. Green in November, 1881?

A. Yes, sir.

Q. Who, if anybody, lived on those lots at that time?

A. Nobody lived on them at that time.

Q. What improvements, if any were there upon these lots at that time?

A. There were no improvements there that I know of.

Q. Take lots 1, 2, 3, and 4 in section 19, are you acquainted with those?

A. Yes.

Q. Were you acquainted with them at the time of the conveyance by your father and mother to William W. Green?

A. Yes.

Q. Who, if anybody lived on those then?

A. There didn't anybody live on them.

Q. Were there any improvements made on them at that time?
A. No, sir.
Q. Take lots 3 and 4 in section 12, township 37, range 10, Lake county, Indiana, are you acquainted with those?
A. Very well.
Q. Were you acquainted with them at the time of the conveyance of your father and mother to William W. Green, in November, 1881?
A. Yes sir.
Q. What if any improvements were there upon them at that time?
A. There were not any.
Q. Who resided upon them, if any one?
450 A. There wasn't anybody living on them.
Q. Take lots 1 and 2, section 13, township 37, range 10, are you and were you at the time of the conveyance by your father and mother to William W. Green, in November, 1881, acquainted with those?
A. Yes, sir.
Q. What if any improvements were upon them at that time?
A. There were not any.
Q. Who, if anybody lived on them?
A. Nobody lived on them.
Q. Take lots 2 and 3 in section 24, township 37, range 10, Lake county, Indiana, are you and were you at the time of conveyance by your father and mother to William W. Green acquainted with those?
A. Yes, sir.
Q. What, if any improvements were on those at that time?
A. There were not any that I know of.
Q. State if you recollect at any time of your father or mother or either of them, pasturing or cutting any hay on this land?
A. Yes, cut hay on them.
Q. Do you know about what year?
A. Every year for a great many years.
Q. Prior to selling to Green.
A. Yes. There is one thing that I want to say about section 24; near the State line there was an old fisherman.
Q. But you say he was not there at the time of this conveyance?
A. No; I don't think he was, my impression is that he was not.
Q. Do you know his name?
A. No, I do not, I think they called him Charlie the fisherman.
Q. He has departed from there long since, has he not?
A. Yes.

Cross-examination waived.

OLIVER O. FORSYTH.

451 STATE OF ILLINOIS, } ss:
County of Cook, }

I, Harry F. Lee, a notary public within and for said county, hereby certify that the above-named Jacob Forsyth, and Oliver O.

Forsyth were by me first duly sworn according to law, to testify the truth, the whole truth, and nothing but the truth, relating to said cause; that their depositions were reduced to writing by this deponent that the said plaintiff attended by Mr. William Johnston, its attorney, and that Mr. William P. Fennell appeared on behalf of the defendants, Samuel A. Kean, Henry O. Felt and Sarah Smale; that said depositions were taken at room 800, No. 84 Van Buren street, in the city of Chicago, county of Cook, State of Illinois, on the 10th day of September, 1895, between the hours of 8 a. m. and 6 p. m. of said day; that the taking of said depositions was adjourned as herein appears.

In testimony hereof I have hereunto set my hand and notarial seal this 20th day of September, 1895.

[SEAL.] HARRY F. LEE,
Notary Public.

Commissioner's fee $21.00 paid by plaintiff's attorneys.

452 *Notice to Take Deposition.*

STATE OF INDIANA, } ss:
Porter County, }

In the Porter Circuit Court, October Term, 1895.

CALUMET CANAL AND IMPROVEMENT COMPANY }
vs. }
CHARLES B. ALEXANDER, ANNA R. KEAN, SAMUEL A. KEAN, }
George B. Mason, *et al.* }

The defendants in the above-entitled cause are hereby notified that on the 10th day of September, 1895, at room 800, number 84 Van Buren street, in the city of Chicago, in the county of Cook and State of Illinois, between the hours of 8 o'clock a. m. and 6 o'clock p. m. of said day, before some officer authorized to take depositions, the plaintiff will proceed to take the depositions of Jacob Forsyth, Clark Forsyth and Oliver O. Forsyth, witnesses to be used in evidence on the trial of said cause, and will, if necessary, continue said taking from day to day until said depositions are completed.

Dated this 3rd day of September, 1895.

WILLIAM JOHNSTON,
Att'y for Pl'ff.

We acknowledge service of the above notice and waive dedimus and certificate of official character of officer before whom said depositions are taken, this 3rd day of September, 1895.

THOS. J. WOOD,
Attorney for Kean & Kean.
W. C. McMAHAN,
Attorney for Mason & Mason.

453 *Testimony of George W. Lewis,*

a witness for plaintiffs, being duly sworn, testified as follows:

Examined by Mr. JOHNSTON:

Q. What is your business?

A. I am superintendent of the Calumet Canal and Improvement Company.

Q. How long have you been such?

A. About three years.

Q. Where have you resided during that time?

A. During that time at East Chicago.

Q. Are you acquainted with this land around Wolf lake and Lake George?

A. I have been over it to a considerable extent during that time.

Q. What is the fact as to whether anybody has been living on it since you have known it—known these lots?

A. With one exception and that with our permission, there has been no person on it.

Q. Who is that?

A. Fishing Charley Grotriske.

Q. State whether there are any buildings or fences on that?

A. I have known of none aside from this of Fishing Charley.

Q. Are you acquainted with that land?

A. Yes.

Q. What, if any improvements have been made on them, during that time:

A. You speak of this surrounding the lake.

Q. Yes?

A. None during our ownership.

Q. State what acts of ownership have been done upon the land by anybody there in plowing, cutting the grass or anything of the kind there?

A. No, none other than ordinary trespassers going on and cutting hay, etc.

Q. Who are they?

A. I think once in awhile they in and cut out a little hay, come from Hammond and different points.

Cross-examined by Mr. FENNELL:

Q. I understand you to testify as to land surrounding this lake?

A. I testify as regarding land owned by the Calumet Canal and Improvement Company.

Q. Please describe the land of this company about which you are testifying?

A. The land owned by this company being a strip of land
454 between Wolf and Lake George and the south end of this lake; the low lands in section 19; the south end of section 18 is of a somewhat like nature and around the east side of Lake George.

Testimony of Ellis Bennett,

a witness for the plaintiff, being duly sworn testified as follows:

Examined by Mr. JOHNSTON:

Q. Where do you reside?
A. Wolf lake—in the State of Illinois—Chicago.
Q. How long have you lived there?
A. I have lived there off and on for—since 1870.
Q. How long have you known the lakes?
A. Since 1868.
Q. Did you know where John A. Smale lived?
A. I could not describe the place; I knew all that country through there.
Q. You heard Mrs. Smale testify on yesterday?
A. Yes.
Q. What kind of a strip was that?
A. Well, it was probably a strip a rod wide; in some places maybe a little more; it runs probably three-quarters of a mile long.
Q. Along the east side of Lake George?
A. Yes.
Q. State whether or not that was at any time covered with water?
A. I know it was covered with water almost every year up to eight or nine years ago. When we have a very dry year there may be some odd places not covered.
Q. What has caused the difference in the last eight or nine years?
A. The canal company put their dredge in there and began ditching through there; put a dredge ditch about 14 or 15 feet wide from the Calumet river into Wolf lake; and from Wolf lake into Lake George.
Q. State what effect that has had on the water?
A. It has lowered the water in the neighborhood, I should judge, about two feet.
COURT: When was that done?
A. About nine years ago.
455 Q. Up to that time, as long as you have known the lakes, how did they compare in size from year to year?
A. Well, they were about the same from year to year. In the spring of the year there would be an overflow. There was a kind of a road run through there between them and a row of trees there. Maybe in some places there would not be any and in other places would be a road; sometimes it would be covered with water; sometimes in the spring a boat could pass through between Wolf lake and Hyde lake.
Q. Take it from year to year?
A. If we had a dry season like, for instance this year, the water was lower. The evaporation of the water in Wolf lake in a dry season was from half an inch to an inch a day.
Q. And taking it from year to year during those years how would it be?

A. It run the same all along.
Q. From the time that you knew it?
A. Up to eight or nine years ago.
Q. That is on account of digging the canal?
A. Yes. In 1874 it was very dry.
Q. In 1874 it was dry then?
A. Yes, that is the year so many of them squatted around Wolf lake.

Cross-examined by Mr. FENNELL:

Q. Is it dry now?
A. Yes.
Q. About the same as it was then?
A. No; it is drier now than it was then.
Q. Does water run uphill or downhill?

Objected to by counsel for plaintiff and the court sustained the objection.

Q. You say that Wolf lake empties into Calumet river?
A. Yes.
Q. Where does Calumet river empty?
A. It has been dammed up this summer.
Q. Where does the Calumet river empty? Into what?
A. The Calumet river empties into Lake Michigan.
Q. Then Lake Michigan must have been lower than Wolf lake?
A. No, when we have a south wind or a west wind right along steady for maybe three or four days—a strong west wind of course Lake Michigan is lower. Take it this summer we had most west winds you could not notice the water running out at the north
456 end; consequently it is lower on this edge of the lake than the north end. The wind in certain directions it will run out. When we have a dry summer it evaporates.
Q. Are you aware that water has been pumped from Lake Michigan into Wolf lake.
A. Yes, they are pumping there now.
Q. What is the purpose of pumping the water into the *the* lake?
A. For the purpose of getting ice.
Q. To keep up their riparian rights?
A. No; the ice companies get the privilege of damming up across there where it runs into Calumet lake.
Q. They got the privilege of damming it and pumping water in for the purpose of raising it higher?
A. That has been done in order to make ice; they didn't have to do it until this canal was cut through there.
Q. They have to do it now?
A. Yes, sir.
Q. And have for several years?
A. Yes, ever since that canal went through there pretty much.
Q. Is that channel dammed up that leads to the Calumet river?
A. Yes, it is dammed up at present.
Q. If that channel was opened and if they had not pumped water

into the lake from Lake Michigan what would be the effect upon Wolf lake and Lake George?

A. It would be a good deal drier than it is now.

Mr. JOHNSTON: We now rest.

Mr. MCMAHAN: The evidence must show that the taxes were paid before these tax sales.

Mr. JOHNSTON: He says there were no sales.

Mr. MCMAHAN: I have evidence there were sales and introduced my deeds.

Mr. MCMAHAN: I now offer in evidence an agreement between Kean *et al.* and Mason. It was marked Exhibit "A."

And thereupon the agreement between Kean *et al.* and Mason was read in evidence and is as follows:

457 *Agreement—Kean & Mason—in Relation to Tax Lien.*

STATE OF INDIANA, }
Porter County. }

Porter Circuit Court, October Term, 1895.

CALUMET CANAL AND IMPROVEMENT COMPANY }
vs.
CHARLES B. ALEXANDER ET AL. }

For the purposes of the trial of this cause it is hereby stipulated and agreed by and between Anna R. Kean, Samuel A. Kean, Henry B. Felt, Orson Felt, and Sarah Smale defendants, and Henry B. Mason, cross-complainant, that the lands mentioned in the cross-complaint of said Henry B. Mason, *was* on the 6th day of March, 1882, at the regular tax sale, sold for the sum of $2,507.60, that being the amount for which said lands were returned as delinquent for taxes for the years 1880 and prior years.

And that said Henry B. Mason shall as against the said Keans and other defendants above named have the said amount together with interest at the rate of six per cent. declared a lien upon the said lands and that there shall be a decree in favor of said Mason foreclosing said lien as against the said defendants herein mentioned.

WILLIAM B. FENNELL,
Their Attorney.
W. MCMAHAN,
Attorney for Henry Mason.

458 The testimony of John Fisher, Frank N. Rossiter and Charles Kreuter as taken by the stenographer on the trial of the cases of Wilcox *vs.* Kean, and Wood *vs.* Renville, and the testimony of Samuel A. Kean, on the former trial of this case, as taken by the stenographer, was by agreement read in evidence in the trial of this case and the evidence of the said witnesses so read in evidence is as follows:

459 WILCOX vs. KEAN.
WOOD vs. RENVILLE.

DECEMBER 16, 189–.

Evidence of Frank N. Rossiter,

being duly sworn, testified as follows:

Examined by Mr. YOUCHE:

Q. What is your name?
A. F. N. Rossiter.
Q. Where do you live?
A. Chicago, Illinois.
Q. How long have you lived there?
A. I have lived there continuously since February, 1890. I was away about twelve years. I left there in 1876. I lived there from the spring of 1868 until August, 1876.
Q. What was your business?
A. Surveyor and civil engineer.
Q. How long have you been such?
A. Since 1868.
Q. Are you acquainted with the lands in controversy in this action?
A. Yes, sir.
Q. Are you acquainted with the location in the northwestern part of Lake county, known as George lake and Wolf lake or Mud lake?
A. Yes, sir.
Q. Have you ever done any surveying in any of these lakes?
A. Yes sir.
Q. Describe the character of the lake which is indicated upon this Government plat, township 37, range 9 west, in Lake county, Indiana, as surveyed and made in 1836?
A. I think the survey was made in 1834 and '35, the original Government survey.
Q. Describe the character of the lake.
A. Its dimensions etc.?
Q. Yes, its general character.
A. I think the township boundaries were made in 1834 and the subdivisions in townships in 1835. The lake covers portions of the southwest quarter of section 19, township 37, and range 9; and portion, more than about half, of the north half of section 19, and
460 about a little more than two-thirds of section 18, township 37, range 9, and a portion of the south half of section 7, town 37, range 9, and it extends over the township line into section 12, and the south portion of section 10, town 37, range 10; and the northeast part of section 24, township 37, range 10.
Q. What is the character of the lake?

A. Well, it is water surface, and the bed of the lake is plain sand, mostly coarse sand surface.

Q. And its character as to permanence——

COURT: Does your examination relate to the time of this survey?

Mr. YOUCHE: It relates to the time when he knew it.

Q. When did you first know it, when did you first see it?

A. I think in 1867 or 1876; the first surveys I made there were in 1874.

Q. I suppose your evidence relates to the lake from the time you first saw it up to the present time, does it——

A. Yes.

Q. Well, go on. What about its depth, general depth, average depth?

A. Well, the depth of the lake is different at different times.

Q. Take the average depth, average stage of water.

A. You mean the average stage of water over the whole surface, what it would naturally cover?

Q. Yes.

A. Well, I should say about two and a half feet, probably.

Q. The average depth:

A. Yes, sir. Take the whole surface of the lake.

Q. What is its greatest depth:

A. Well, I should think in high water it would be probably five feet, possibly more than that; five and a half.

Q. What is its surrounding? What kind of land is it around it?

A. Sand ridges and sloughs.

Q. What kind of vegetation?

A. It is weeds and coarse slough grass.

Q. On the ridges, originally, before it was cut off?

A. Some scrub-oak timber and underbrush.

Q. What about its shore lines, as to whether or not they are reasonably well defined and distinct?

A. Yes sir; they are.

Q. How is the shore of the lake as to being a sandy beach or not?

A. Well at high-water point there is on the east side a portion of the length a sort of ridge, a narrow ridge.

461 Q. A beach?

A. Yes, sir; a sand ridge.

Q. As to whether that forms a beach or not?

A. I don't know as I understand your question. The east portion of the lake in high water extends over in places over a large surface of ground.

Q. Take the average stage of water, as to whether or not there is a distinct, well-defined limit of the lake?

A. There is on the boundaries of the lake; in some places it is not.

Q. As to permanence of the lake since you have known it?

A. It is permanent; it is there.

Q. As to whether or not it has been about the same all the time?

A. Yes; in a high depth of water.
Q. The depth between high and low water?
A. High and low water.
Q. As to whether it has remained about the same except with those variations, high and low water?
A. Yes, sir it has remained the same.
Q. Take lot No. 2 in section 18—but before I come to that, there is a part of the lake that is deeper than the rest; a part that has a greater depth than the rest: in speaking of the deepest part of the lake——
A. Yes, sir.
Q. Where is that?
A. Opposite the center of section 18; around about the line of section 18; it is pretty well toward the west edge of the water; I should say within an average of three or four hundred feet of the west shore.
Q. Can you upon this map of the lake here indicate about where the deepest part of the lake is?
A. I can, I think, as far as the lot is concerned.
Q. Please do so to the court.

(Witness indicates on the map.)

A. I surveyed from this point to that (indicating). I did not go down as far as the south line of 4 projected.
Q. How far from the west line of the section is that deepest part of the lake,—the west line of section 18?

Objected to on the ground that there is no west line, or section line——

Q. I mean what would be the west line if it were extended, if it were produced?
A. I never have run the west line of the section through, but by calculations it would throw that lower point in the lake, about an average, I think, of 250 or 300 feet, possibly; somewhere in
462 that vicinity.
Q. From the west line of what the section line would be?
A. Yes sir.
Q. Now, how as to the depth of water? What is the depth of water along at that deepest channel?
A. I measured it when the water was very low.
Q. Take it at an ordinary stage of water.
A. I think it would be over four and a half feet.
Q. I understand that you made a survey of that?
A. Yes sir.
Q. That you know from your own knowledge substantially?
A. It was about four feet. At the time I measured it the water was low.
Q. Take the average stage of water in the lake how much deeper would the depth have been at that place?

Objected to on the ground that he has stated all he knows about it.

COURT: He seems to be familiar with all portions of the lake; if he has knowledge of it he may state.

A. Five feet.

Q. Have you measured the depth between this deepest place and over toward the east shore?

A. Yes sir.

Q. How does the depth run, how would the depth be—take the average stage of water?

A. Well, the surface of the lake is almost as a plane surface. That is—you understand what I mean.

Q. The surface is plane?

A. The bed of the lake.

Q. The surface, the bed of the lake is almost a plane?

A. A plane surface. I found in making soundings of that portion in each 100 feet is regular; $\frac{1}{10}$, $\frac{2}{10}$, $\frac{3}{10}$ as the case might be. The water of the deepest place in the lake to where there was no water gradually decreased until it run out entirely.

Q. That is true in front of these two lots?

A. Yes sir.

Q. You made soundings and measured it?

A. Yes sir.

Q. Have you seen this place where that little shanty or Kean house is?

A. Yes sir.

Q. Where is that with reference to the lake?

A. The house is about near the south line of lot 2, I should think
463 100 or 150 feet north of the south line of lot 2, and possibly 50 feet east of the water in the lake at a medium stage of water.

COURT: Do you know where it is with reference to the meander line?

A. I think about 100 feet west of the meander line; it may be a little more than that, probably about 200 feet.

Q. Is this lake connected with any other lake in a state of nature?

A. In a stage of high water—yes.

Q. What other lake?

A. Wolf lake.

Q. Where does Wolf lake lie?

A. It lies west of Lake George.

Q. And where does this lake empty its surplus waters, this lake, this Lake George it is called?

A. Into Wolf creek.

Q. This lake that you have been testifying about, its general character and depth, by what name is it now generally known?

A. So far as I know,—Lake George.

Q. Lake George?

A. Yes, I heard it called Mud lake, and other names. I think that is the general name.

COURT: I think upon the Government plat there are no names given to either one of them. It is just indicated "lake." I think

probably the Government survey did not name any of the lakes, just indicated them.

A. The Government refers to this lake in their meander notes as merely Lake — 17, etc.

Q. Wolf lake, with what is it connected, into what does it empty itself, its surplus water?

A. Into Lake Michigan.

Q. Where?

A. At the north end of Wolf lake.

Mr. FENNELL: I object for the reason if we go into that question it will take another day to try this case; it has nothing to do with this lake or this land. If we have to go into the question as to whether Wolf lake has a permanent outlet or not, we would have a much bigger case, but we would not be any wiser so far as this case is concerned, than we are now.

Mr. YOUCHE: I want to show the general character of this lake. This is one of the peculiarities of the lake. It will become pertinent.

Q. Mr. FENNELL: I object to any evidence as to the condition of Wolf lake or the outlet of Wolf lake, and move that the answer of the witness as to the outlet of Wolf lake be stricken out, for the reason it is immaterial and irrelevant and does not tend to prove any of the issues in the case.

464 Mr. YOUCHE: I want to show how it is fed, how it discharges its waters and where its surplus waters go. I want to show it is connected with Lake Michigan and how it is connected, and how that the height of water in the lake is affected by the water in Lake Michigan.

Mr. FENNELL: All of which we deny.

Mr. YOUCHE: It bears on the subject of its permanency.

COURT: I think, if I am not enlightened any further on the question of materiality,—I think that since you have got from this witness a general description of the lake, and its permanent character, I think I will sustain the objection, then you may make your offer to prove. That will present the question.

Mr. YOUCHE: We offer to prove by this witness, in answer to this question——

COURT: I will sustain the motion to strike out. I think when you have established by direct evidence its permanent character, it is for them, by cross-examination, to show otherwise.

And plaintiff excepted.

Q. Now we ask this question: How does the water in this Lake George correspond with the waters in Lake Michigan? How is its height and depth affected by the height and depth of the water in Lake Michigan?

Objected to by defendant- on the ground that it is immaterial and irrelevant.

And the court sustained the objection. To which ruling and decision of the court the plaintiff excepted.

And thereupon plaintiff, by counsel offered to prove by the witness, in answer to the question, that the waters of this lake are directly connected with the waters of Lake Michigan; that the height of water in this lake is affected by the height of water in Lake Michigan and that in time of high water the water in this lake is on a level with the water in Lake Michigan; and its permanency is enlarged to a certain extent, established by the fact that the connection between the lakes in the manner I offered to prove.

Mr. FENNELL: I guess I will admit that. I want to save time.

Q. You may state, Mr. Rossiter, what the fact is as to whether this lake is permanent, fixed lake, that is Lake George?

A. I think it is.

COURT: Can you determine as to whether or not it has
465 been permanent and fixed lake for 40 or 50 years from the appearance of the lake at the time you first knew it?

A. Just what the record evidence of the Government leaves us; I think the boundaries of the lake are probably permanent where the Government survey made them.

Q. Have you had any experience in measuring, surveying bodies of water like this, in observing their character as to permanency?

A. Yes sir.

Q. Now judging from all the indications of this lake, what is the fact as to whether or not this lake in, say 1832, 1833, '34, '35, '36, '37, was of the character that you have described as to permanency?

A. The best evidence we have——

Mr. FENNELL: That is calling for an opinion, that is a matter not within his knowledge and could not be.

A. I think I answered that question—answered the question the judge asked. The best evidence, the earliest evidence, is the evidence of the Government survey, and that is about 60 years ago.

COURT: They are asking you now, if you can determine what was the character of the lake along about the time of the Government survey, from the general character of the lake, from the time you first knew it, considering all matters there within your knowledge and as to matters which might affect the water in the lake at the time you first knew it.

A. I think the general character of the lake has been the same as it is now.

Q. Was then the same as it is now?

A. Yes sir.

Cross-examined by Mr. FENNELL:

Q. How long is Lake George, north and south?

A. All I know is by the Government survey; it is a little over two miles.

Q. How wide is it?

A. I would say the average width was about half a mile.

Q. What is the greatest width? Is it a mile?

A. No.

Q. Is it three-quarters?

A. I think possibly in the widest point it might be, three-quarters; I don't believe it is quite; it may be possible in the widest point.

Q. Is not there an island in Lake George?

A. Yes.

466 Q. Tell the court where that island is and its character, what you know about it.

A. That island is near the south line of lot 3 extended.

Q. Will you pleasd mark that island on that plat where you made the other marks?

A. It is about—the south edge of the island is on the south line of lot 3 extended. It is east of the center of the lake and about midway between the deepest center of the lake and the east meander line of the lake.

Q. What number of acres of land?

A. The island probably has not to exceed an acre and a half, possibly two acres. I never made measurements across the island. Possibly an acre and a half or two acres.

Q. Are there any trees? What, if any, vegetation is on the island?

A. There are trees and underbrush on the island and some grass.

Q. What is the size of the trunk of the largest tree?

A. I could not say; there are some pretty fair trees, possibly twelve inches through some.

Q. What kind of trees are they?

A. I don't know, I never have been in it; the ordinary trees growing in that country—probably elm, scrub-oak trees of that nature. Undoubtedly the ordinary growth of trees in that vicinity.

Q. Now what do you call the shore line, Mr. Rossiter?

A. The line at high water——

Q. Low water or the average stage of water?

A. The west line of the lake is shown——

Q. I am speaking of the east line of the lake abutting these lots that we are talking about.

A. On the lots there the shore line is narrow; there is sand there with some underbrush, I think, growing on it. I don't think it exceeds eight or ten feet in width, possibly 18 inches high; in places sand ridge that has been thrown up there.

Mr. YOUCHE: Thrown up by the water?

A. It may have been, it might not have been.

COURT: Did the ground there rise abruptly from the water?

A. Yes, what I call the beach of the lake is clear sand.

Q. How far does that run back?

A. At times possibly 300 feet, in that bar and at times the water covers all this over, up to the ridge from the shore line on lot

467 2; there is a portion of lot 2 that has the same kind of shore line; a portion has not; I think the north portion has not; that the shore line on the north line of lot 2 is plane surface if I recollect right.

Q. Where is this apparent shore line that you speak of with reference to the meander line?

A. I never have run the meander lines at all but by calculation the shore line is on these two lots generally west of the east meander line.

Q. How far?

A. Well, it varies in places, I think from 100 to 300 feet,—possibly from nothing to 300 feet. I say I never have run a line out; the shore line is crooked.

Q. And the Kean house is situated on this land between the meander line and the shore line?

A. Yes; there is an abrupt turn in the lake line there in what I am trying to define as shore line about on a line between the two lots.

COURT: Does the evidence show how long that house has been there?

Mr. FENNELL: No.

Mr. YOUCHE: How long according to your evidence.

Mr. FENNELL: More than fifteen years; I don't think it has been twenty years.

Mr. YOUCHE: There is no evidence of title by possession, your honor.

Mr. FENNELL: I don't think we have been back twenty years; yet I think we have been pretty near it.

Q. That land between the meander line and the shore line on which the Kean house is built has vegetation upon it has it not?

A. Directly between the Kean house and the shore line it has, taking the width of the Kean house; if you go south to about the line between the lots there is no vegetation in places.

Q. Well, there is vegetation in some places and none in others?

A. Yes, sir.

Q. Didn't you assist in making a new survey which is commonly called the Wilcott survey of the bed of the lake?

Objected to by Mr. Youche.

Mr. FENNELL: It is for the purpose of testing his familiarity with the land.

A. I cannot answer that question without seeing the field-
468 notes of the survey. I made surveys, I think, of the lake beds in that vicinity. That is Lake George, Wolf lake and Hyde lake in 1874, I believe, and a portion of the time I was employed by Mr. Wolcott and a portion of the time I was not.

Q. I would like to ask you if you are aware that Mr. Wolcott surveyed the bed of Lake George by direction of the United States Government?

Objected to on the ground it is not cross-examination——

A. I would like to say this as far as the last question is concerned I would like to put myself on record correctly. There is some little talk about that survey in both States; I was working for Mr. Wolcott at the time he made those surveys. He was deputized by the United States I never saw or knew what there was in the Illinois portion of that survey until recently—until within the last three

years. They have tried to bring me in there as a party to that survey.

Q. I want to ask you, Mr. Rossiter, what is the lowest depth of water that you ever saw in Lake George or Mud lake; how near dry did you ever see it or know it to be?

A. I never saw it when I had an opportunity of testing the depth of it, but what it was about four feet in the deepest place—possibly three feet and $\frac{9}{10}$ths, but I think in some places four feet.

Q. Did you know of its ever having been nearly dry at one time?

A. No sir.

Redirect examination by Mr. YOUCHE:

Q. I understood you to say that this Kean house that they talked about is located between the lake and where you understood the meander line was?

A. He asked me between the shore lines.

Q. As between the lake and this meander line? Is it situated between George lake and the meander line on the east side of it? As a matter of record it is in Lake George, but take the ordinary water line as to whether or not it is not between the ordinary water line and the meander line?

A. I think at an ordinary stage of water, I think the water would come within 50 feet of the house and any way up to the boat-house, which I would say is 250 ft. of the house at an ordinary stage of water.

469 Q. When did you first see that house?

A. Along in the early—possibly February, 1891.

Q. What kind of a house is it?

A. It is a small board house. I paid no attention to it.

Recross-examination by Mr. FENNELL:

Q. You say you saw Lake George as early as 1869?

A. Yes.

Q. You say you did not see that house until 1891?

A. That is my recollection that I did not see it until 1891.

Q. If it was there you had an opportunity to see it?

A. Yes, it might have been there. I made a survey of that land in 1874; I could not swear it was there. There were different houses on that when I made the survey. But I could not locate that without my field-notes.

470 *Testimony of John Fisher.*

was the next witness and being sworn, testified as follows:

Examined by Mr. YOUCHE:

Q. You have been county surveyor of Lake county?

A. Yes.

Q. How long were you county surveyor?

A. About 31 or '2 years.

Q. How long have you lived in Lake county?
A. About 34 or 35 years.
Q. You know this lake here known as Lake George?
A. I do.
Q. How long have you known that lake?
A. Well, about twenty-five years.
Q. Have you frequently surveyed lands around there?
A. Certainly I have.
Q. Have you ever assisted in measuring its depths?
A. I have.
Q. When first?
A. 1876.
Q. At what was the stage of water when you measured it? At ordinary stage of water?
A. In the month of July, quite a dry time, July 21, 1876.
Q. As to whether or not the water was an ordinary stage, or lower than usual?
A. Ordinary stage of water. That is my recollection.
Q. You may describe this lake as to permanence taking into consideration its character from the time you first saw it down to this time.
A. I would call it permanent.
Q. Permanent lake?
A. Yes, sir.
Q. What did you find when you measured it as to depth?
A. Some places quite deep and in other places not so deep.
Q. Where was the deepest part, the channel of the lake, the center of the lake as to depth? You can indicate it here on this map.
A. I have got notes of the whole business.
Q. They can draw that out if they want to. Indicate with a pencil in a general way——
A. Over the west edge of Lake George on the south line of section 7, bearing east 2, 3 feet.
Q. What I want to get at, Mr. Fisher, indicate a line running down this way that shall indicate the deepest channel, the deepest part of the lake. Look at your notes.
A. From this point, from a point where the section line
471 strikes Wolf lake. The east side of the lots toward the outlet between the two lakes is like this:——
Mr. FENNELL: It runs from the northeast corner southwesterly?
A. Southwesterly towards to the outlet. I don't go straight down.
Q. What is the depth of the deepest part of the lake, the channel of the lake?
A. 6.2 feet.
Q. By actual measurement?
A. Yes sir.
Q. Take the general bottom of the lake. State whether or not that is sandy.
A. Generally a sandy bottom; hard sand and gravelly.

Q. What about the shore line, as to whether or not the limits of the lake are well defined?

A. Well, they are well defined in some places; not quite as well in others.

Q. Now, Mr. Fisher, taking into consideration the lake during the whole time that you have known it, state whether or not it has always been about the same character as to depth and permanence?

A. Yes, as a general thing it has.

Q. Now take the lake and the indications that you have seen there you may state what was the condition of the lake along in the 30's when it was first surveyed by the Government?

A. I will have to answer that mostly by the Government field-notes——

Q. Not by the Government field-notes. Take your opinion, having seen it for thirty years, what was its condition then and situation?

A. I think about the same; in measuring from a permanent point established by nature with the field-notes so many chains and links it is nearly the same distance now as it was then.

Q. It is about the same now as it was then?

A. Yes.

472 MONDAY MORNING, *Dec.* 19, 189–.

FRANK N. ROSSITER was recalled by the plaintiff and testified as follows:

Examined by Mr. YOUCHE:

Q. You spoke about this shanty known as the Kean shanty, where is it located with reference to the center of the lake, that is, the center as to depth that you described the other day?

A. It is something over 2,000 feet east of the center,—east of the lowest point in the lake.

Q. East of the deepest point in the lake?

A. Yes sir.

Q. Where is it located with reference to the areal center?

A. The original Lake George?

Q. Yes, this Lake George, the area of it. Get a center line according to the area that runs north and south, now where is it located with reference to the center?

A. Well, I would say 1,500 or 1,600 feet; maybe not quite so much as that.

Q. Which way?

A. The shanty?

Q. Yes.

A. The shanty is east of the center of the lake.

Q. East of the areal center?

A. Yes sir.

Q. Where is this island you spoke about with reference to the center, with reference to the depth of the lake center, to the areal center——

A. The island is about 1,200 feet east of the center of the lake at the deep-water point.

Cross-examined by Mr. FENNELL:

Q. I want to ask a question, Mr. Rossiter, in reference to the shore line so we may understand. I will ask you this out of court. Do you contend that the shore line in 1834—'5 and '6 at the time of the survey was right where the field-notes of the survey makes it when the waters have receded or not; what is your position in regard to that?

A. Let me understand that question.

Q. Do you contend that the original margin of the lake, of this lake, or the shore line that you call it, was where the meander line was run?

A. I don't know whether the waters have receded since that time or not from actual knowledge. The notes show that the lake was at one time outside further still and even outside of the mean-
473 der line. At what particular stage of water that boundary of Lake George was established I cannot tell.

Q. Didn't you tell me Saturday that you had no doubt that the water line was right where the meander line placed it at that time as far as you knew?

A. No sir, I did not. You asked me if I contended so, thought that the meander line was not right and I told you I did not think so.

Q. Didn't you say that you had no doubt that it was?

A. No, I said I did not undertake to state that the meander line was incorrect. It would have made no difference if I did; the records of that meander line would show the situation in that respect.

Q. Have you talked with anybody on that question?

A. The one we are discussing?

Q. The question I asked you.

A. No sir.

474 *Testimony of Charles Kreuter,*

a witness for defendant, being sworn, testified as follows:

Examined by Mr. FENNELL:

Q. What is your name?
A. Charles Kreuter.
Q. How old are you?
A. Sixty.
Q. Where do you live?
A. In Whiting.
Q. Where is the house that you occupy?
A. That is lot 2 in section 18, in the Kean cottage.
Q. How long have you rented that cottage from Kean?
A. I rented it in 1880 in January.
Q. Did you have possession from that time to this?
A. Yes.

Q. You have possession?
A. Yes.
Q. Who lived in that cottage before you rented it?
A. The first house—when the house was that Mrs. Kean lived in it.
Q. How long did she live there before you?
A. She lived before me about five years.
Q. Do you know anything about the meander line and the water line?
A. I know about some; I never measured it.
Q. How long have you known that Lake George?
A. About since 1866.
Q. From your knowledge of it do you think that the water was ever further east than it is now?
A. Sometimes it was in some places.
Q. You may go and state the character of your possession there, what you did and what you used the lake for?
A. I used it for hunting and fishing, keeping boats, keeping myself—keeping the Hunter's Home, you know.
Mr. YOUCHE: I suppose that he sailed on the lake.
A. Row with a boat.
Mr. FENNELL: What was the lowest stage of water that you ever saw in Mud lake?
A. About two feet.
COURT: I suppose you mean Lake George by that?
A. Yes.
Q. What is the usual and ordinary name of the lake?
A. We always called it Mud lake since I know it. Everybody calls it Mud lake now.
475 Mr. YOUCHE: There is one question I want to ask you and then I am through.

FRANK N. ROSSITER was recalled by plaintiff and testified as follows:

Examined by Mr. YOUCHE:

Q. Mr. Rossiter, where is this Kean shanty with reference to center, what would be the center line of the section; the line that runs north and south, runs through the section, what would be the center line of the section?
A. The line would be 40 chains west of the east line of this fractional section, and the Kean cottage, I think, is 1,700 or 1,800 feet west of the east line, which would be some 700, 800, or 900 feet east of the center of section 18; maybe no more than 700 or 800 feet.

476 *Testimony of Charles Kreuter*

was recalled by defendant and testified as follows:

Mr. FENNELL: I want to ask Mr. Kreuter how much land that your lease covers?
Mr. YOUCHE: The lease will show for itself. We object, we object to showing what the lease covers, because the lease——

Mr. FENNELL: I will ask Mr. Kreuter how much land he had possession of.

Mr. YOUCHE: We object.

Mr. FENNELL: I want to know what you did as tenant of Mr. Keane? What did you do under the lease that you got from your landlord?

COURT: What did you do under the lease that you got from your landlord with reference to occupying the property?

A. I was living in the house, attending to my business. I looked over the ground and cut hay.

Mr. FENNELL: You testified just now——

COURT: What's the use going into this question? Is it denied that he attempted to hold possession under the lease?

Mr. YOUCHE: No.

Mr. FENNELL: That is all.

477 CALUMET CANAL AND IMPROVEMENT COMPANY *vs.* ALEXANDER ET AL. } No. 7917.

JULY 1, 1895.

Testimony of Samuel A. Kean,

being sworn as a witness in said cause testified as follows in behalf of defendant.

Examined by Mr. FENNELL:

Q. What is your name?
A. Samuel A. Kean.
Q. Where do you live?
A. In Evanston.
Q. What county and State?
A. Cook county, Illinois.
Q. Are you acquainted with Anna R. Kean?
A. I am.
Q. The defendant in this case?
A. I am.
Q. Are you related to her in any way?
A. She is my wife.
Q. Will you please state briefly the facts in regard to your taking possession of this land in controversy and at what time? Just what you did for Anna R. Kean.
A. You mean to go back to the beginning.
Q. To the beginning.
A. In 1874 a number of people took homesteads——

Mr. JOHNSTON: We object to what a number of people did.

COURT: Do you claim under the statute of limitations?

Mr. FENNELL: I think I do.

COURT: With that view I suggest that the court receive the evidence and take the objections under advisement. I have to pass on

this matter as it is presented. As to saying what the neighbors did I think it is immaterial.

Mr. JOHNSTON: Your honor, if they are going into that question we will have to ask for time,—but I may wait first and see what his evidence is.

COURT: Proceed.

Ans. I was going to say, these parties in 1874 homesteaded that property in question——

Q. By the "property in question" you mean the beds of the lakes?

A. Yes sir. Do you wish me to say anything about the Wolcott survey?

Q. Tell it in your own words?

A. After homesteading it they made *made* application for the Wolcott survey and it was granted in March, 1875. I furnished money to about all of the parties and houses were built for them on
478 certain parts of the property. They took possession in April, 1875.

Mr. JOHNSTON: That is not twenty years from the time of the commencement of this suit.

Q. What time did you say they took possession?

A. Most of them took possession in 1874 and in March, 1875; before I think I helped to take possession by finishing their buildings and in March moved into them and early in April.

Q. Did you build that building on the shore of Lake George, or cottage, commonly called the Kean cottage?

A. I furnished and bought the lumber and sent it down to the men that built it.

Q. Who lived in that cottage?

A. My mother.

Q. Did any other member of your family live there—about there?

A. Yes; south of that towards Hammond my sister lived there.

Q. Did your brother ever live there?

A. He lived on the other side.

Q. I did not mean in that house. I will ask you if you acquired the title of these homesteaders? Tell the court how that was.

Objected to by plaintiff.

Mr. FENNELL: I want to show, it the court please, that this land was originally homesteaders'; that Mr. Keane bought out these homesteaders and acquired their title, and afterward and in order to perfect his title he filed scrip upon the land, let the homesteaders be cancelled and got possession immediately, without having to wait for five years, but that he first purchased the homestead interest.

COURT: These are matters of record.

Mr. FENNELL: I want to show that he had originally taken possession under the homesteader law.

COURT: These things which are matters of record you ought not to testify to.

Mr. FENNELL: I want to show the facts in regard to possession.
COURT: No objection to that.

Q. When did these people take possession first of the land? Any of the homesteaders?
A. They all took possession first.
Q. When?
A. In the spring of 1874.
Q. Are you sure there was none of them there as early as 1873.

479 Objected to by plaintiff.

Q. Will ask you if you representing Anna R. Kean, if you had continual and uninterrupted possession from that time to the present time?

Objected to by plaintiff on the ground that it is a conclusion.
COURT: What constitutes possession is a question of law.

Q. Who else did you put there for her?
A. You broke me—shall I commence where I left off before?
Q. I want to hasten the evidence——
A. I am not clear but what some of them were there in 1873, I know with two exceptions, in the spring of 1874; some contests came up about that time. Arrangement was made whereby Sioux scrip*t* was allowed to be located on the property.

Objected to by plaintiff on the grounds that that is a matter of record. The court sustained the objection.

COURT: He is asking you now concerning the history of the property.
A. Arrangement was made whereby certain interests were purchased from these parties. Since that time the property has been constantly in possession of Mrs. Kean.

Mr. JOHNSTON: That is a conclusion.

Q. You say it has been constantly in possession. Mr. Keane, state how, in whose possession?
A. I stated, Mrs. Kean's.
Q. Who have occupied it? How have they occupied it?
A. It has been occupied by people living on it themselves or by lease.
Q. To who, was it leased?
A. Charles Kreuter.
Q. Do you know how long Kreuter has been there?
A. I could not tell you.
Q. Do you know if he is there now.
A. He is there now.
Q. Did Kreuter move into the cottage built formerly and occupied by yourself or your mother?
A. He did.
Q. Did your mother succeed immediately the homesteaders on that land?
A. She did.

Q. These leases have been matters of record have they not?

Q. Mr. JOHNSTON: Well, the record will show.

Q. I will ask, you, Mr. Kean, if Mr. Kreuter's living there
480 has been open and notorious, as your tenant?

Objected to by plaintiff and the court sustained the objection.
COURT: He can state what he done.

Q. I will ask you to state, as far as you know, what Mr. Kreuter has done there in the way of occupying that land?
A. He has had charge of the grass and fishing——

Objected to.

Ans. He has fished and cut grass and kept the house in repair and made some improvements.
Q. Have you ever been there yourself?
A. Yes.
Q. Did you ever sleep in that house?
A. Yes sir.

Cross-examined by Mr. JOHNSTON:

Q. Who was it went there as early as 1874?
A. I think John A. Smaal went there as early as 1873.
Q. Is he the first one?
A. I think he is.
Q. Now, no others until some time in 1874?
A. I think two gentlemen by the name of Felt.
Q. Are you holding under Smaal?

Mr. FENNELL: Let the abstract show the sources of his title.

Q. Do you claim that land that Smaal went on?
A. Mrs. Kean claims all land that any of them went on.
Q. Including that that Smaal had?
A. Including all.
Q. When did you acquire the Smaal property?
A. All of them were acquired at the time arrangements were made for the Sioux scrip.
Q. When did you acquire the Smaal property?
A. My recollection is it was some time in 1874.
Q. Was he there at that time?
A. He was there.
Q. He was ousted?
A. Not to my knowledge.
Q. When did Charles Kreuter go there?
A. I don't remember the date.
Q. Can you tell about when it was?
A. I would like to refer to——

Mr. FENNELL: Mr. Kreuter's evidence shows that he went there in 1880.

Q. He is only claiming four or five acres?

A. He has about 1,600.

481 A. On about 1,600 acres?

A. About 1,600.

Q. That is not fenced in?

A. Not all of it.

Q. There is not but a few acres fenced in?

A. I don't know about that.

Q. You are not familiar enough to say whether it is fenced and yet you are swearing to possession?

A. That was fenced I believe all of it.

Q. There has not been any fences on it for years?

A. There has been fences torn down by the opposition, forcibly torn down. The party you represent tore down the fences.

Q. They have been down for years?

A. I don't know how many years.

Q. They have been down for how long?

A. You are not doing it.

Q. Don't get smart. Answer my question.

Mr. FENNELL: We object. Remarks of that kind are not proper.

Q. The opposition you say, the Calumet Canal and Improvement Company have been tearing down the fences for years?

A. I did not name the Calumet Canal and Improvement Company.

Q. Answer my question, sir.

A. The party who sold to the Calumet Canal and Improvement Company.

Q. The Calumet Canal and Improvement Company since it has had it kept the fences down.

A. I could not say—answer that.

Q. You know they are down?

A. I could not say how many are down.

Q. Don't you know there are no fences except a small fence where Kreuter lives?

A. I could not say.

Q. Do you know to the contrary?

A. I could not say.

Q. Before the selling Forsyth tore them down?

A. He had something to do with it.

Q. He claimed to have owned that or his wife?

A. He tore them down——

Q. I asked you if he did not claim to own it or his wife?

A. I believe they did.

COURT: How often were you there, Mr. Kean, from 1874 on for several years?

A. For several years I was down there several times a year; latterly I have not been there more than once or twice for some time.

COURT: When did this trouble first commence over this question of occupancy?

A. I think it commenced back as far as 1875 probably.

482 Mr. JOHNSTON: All the time then?

A. It has been in times.

COURT: What would the parties do?

A. Fences were built—these homesteaders built fences; many of them were torn down, by Mr. Forsyth and his friends. They could not stand there, take shotguns on the ground. Then a highway was fenced up by Mr. Forsyth. That fence they tore down.

COURT: With reference to the land in the immediate vicinity of Mr. Kreuter's house what was done in reference to that, if anything?

A. I don't remember any fences that were torn down there.

Mr. JOHNSTON: As a matter of fact these were not built until 1880, until Mr. Kreuter went there. Do you remember when that was?

A. They were built around a garden spot there right away.

Mr. JOHNSTON: When did they build around the garden spot?

A. Probably the latter part of 1874 or the fore part of 1875.

COURT: Is that house where Mr. Kreuter lived, is that the house where your mother lived?

A. Yes.

COURT: When was that first fenced?

A. I think about the time the house was built; they put a little fence around it in March.

COURT: March when?

A. 1875.

Mr. JOHNSTON: Do you claim, Mr. Kean, that your wife was in possession of this land, or that Smaal was in possession at the time of conveying to your wife?

A. If I could look at the record——

COURT: Was Smaal in possession *that* at the time of conveying to your wife?

A. I could not answer that question.

COURT: Was the building there at the time he conveyed to your wife?

A. I don't think you will find any record direct from these parties to my wife.

Mr. JOHNSTON: There is no record, you mean to say?

A. I think your abstract will show.

Mr. JOHNSTON: You say you think there is no record?

A. I refer you to the abstracts.

Q. Is that your opinion that there is not any record?

COURT: He says he don't know.

Mr. FENNELL: Is it not a fact that your wife has acquired title to this property by mesne conveyances?"

Mr. JOHNSTON: He said "direct to my wife."

483 Mr. FENNELL: Judge Johnston, Mr. Kean, said "direct to my wife." You want to convey the impression that he said "direct from Smaal to my wife."

COURT: Then I will ask the reporter to read.

Mr. FENNELL: He is giving the impression what Mr. Kean did not say——

Mr. JOHNSTON: I have a right to make such remarks when you make such a statement.

Mr. FENNELL: I don't think you have a right to put words into his mouth that he did not use.

COURT: There is nothing before the court, gentlemen.

Mr. FENNELL (and continuing): I will ask you the question, what you meant by being no record of the conveyance from Smaal to your wife?

A. Henry O. McDaid was alive at that time and conducted the negotiations——

Q. Who was Henry O. McDaid?

A. He was an attorney-at-law at that time.

Q. A partner of Leonard Swett's was he not?

A. No; he was not. Leonard Swett's partner was John P. Wilson at that time.

Q. What did McDeid do?

A. He had charge of the arrangement of the homesteaders for the Sioux scrip and conducted those negotiations.

By COURT as follows:

Q. When did you first see this property?

A. My recollection is the winter of 1873—to the best of my recollection.

Q. This house that was built for your mother was put up when?

A. In March, 1875.

Q. There was no one living there prior to that time?

A. The other homesteaders I was speaking about lived there prior to that time.

Mr. JOHNSTON: Who are those other ones?

A. I could not exactly name all. I think a gentleman by the name of Robison and another one by the name of Waters and half a dozen others.

COURT (and continuing): Where did they live?

A. They were there. The homesteaders took possession of all the bed of the lake.

Q. Where?

A. On shore of the lake.

484 Q. In one house?

A. No, they built houses around.

Q. Where were they?

A. Clear around the lake, different places. They done it in reference to covering the lake—the bed of the lake.

Q. When did they move out in reference to the time that your mother moved into the house?

A. This particular house was built especially for her. They did not move out.

Q. What became of this house?

A. I can't tell you from my knowledge except my mother's house was still standing there years after. I understand that different arrangements were made, people moved to different parts of the country; some of them sold out and the houses were torn down.

Q. How frequently did I understand you to say you were out to this property?

A. I should say just from my memory for five or six years I was down there not less than four times a year—for several years; after that I was there less frequently; I have not been on the ground for more than a year now.

Mr. FENNELL: You had a tenant there, however?

A. Yes.

Mr. JOHNSTON: Does Kreuter pay you any rent?

A. Yes.

Mr. JOHNSTON (continuing): What does he pay you?

A. Consideration for doing certain work.

Q. What was the work he was doing?

A. In the first place there is considerable work to go around the lake and keep watch of the trespassers. It is some work to watch trespassers.

Q. He goes around the lake keeping the other police off?

A. He is keeping them off so far as I know.

Q. You know they have torn the fences down right along don't you?

A. Yes sir, there have been fences torn down.

By Mr. FENNELL (and continuing): How did McDeid acquire the rights of these homesteaders?

Objected to by plaintiff.

COURT: What is the purpose of this?

Mr. FENNELL: I want to show the contract between McDeid and the homesteaders; that he bought them out.

Objected to by plaintiff.

485 Q. Is there such a contract in writing?

A. I don't know as to that. There may be. There is a contract——there was a contract—whether it is written or not I don't know.

Mr. FENNELL: I want to show within the beds of these lakes, the beds of the two lakes were leased by Charles Kreuter.

Q. Were all lands within the beds of these two lakes contained in the lease to Charles Kreuter?

Mr. JOHNSTON: If there is a lease it will show for itself.

Q. I will ask you if Charley Kreuter is living on the land described in the lease?

A. Yes sir.

Mr. JOHNSTON: There is no lease proven.

Mr. FENNELL: Is not the abstract enough?

Mr. JOHNSTON: Does the abstract show a lease?

Mr. FENNELL: It shows more than one. That abstract is not brought down to date.

Mr. JOHNSTON: There is no copy of the lease there.

Mr. FENNELL: I will ask you if it was a written lease?

A. They were all.

Q. Is it recorded?

A. It was recorded several times. Whether the last year is recorded or not I don't know.

Mr. FENNELL: I ask the court to consider it in evidence. I don't know what the abstract shows.

COURT: If you want to make a showing for a continuance—that is another matter. I will give you an opportunity to do that.

Court took its noon recess, and when again convened, the following evidence was heard from Mr. Kean.

Testimony of S. A. Kean,

recalled in his own behalf and examined by Mr. Fennell as follows:

486 Q. Mr. Kean, I want to ask you, if McDeid, if Henry O. McDeid had charge of these matters as attorney from the time that these homesteaders originally settled on this land until the patents were issued under the Sioux scrip location?

Objected to by plaintiff.

Mr. FENNELL: I want to show that it was one continuous transaction by one man.

COURT: You can show that he had charge of certain matters between certain times.

Q. Probably the question would be to ask Mr. Kean what McDeid did from the time the homestead was located upon the land, took possession of it until the scrip was located and the patents were issued.

COURT: Do you know of any proof that the scrip was located?

Mr. FENNELL: By the abstract.

COURT: Fix the dates then.

Q. Between 1874 when the Wolcott survey was made and March first, 1887, state what McDeid did during those times?

Ans. McDeid was attorney in the case from the time the homesteaders first settled on the land until the patents were issued, and represented them for many years after that, for that matter.

Cross-examined by Mr. JOHNSTON:

Q. How do you know that?

A. From personal knowledge.

Q. Well, tell us what your personal knowledge is?

A. Ask me a little closer question.

Q. That is as close as I want to ask it now. Tell us what your personal knowledge is?

A. I know that he was attorney as well as I know that Mr. Fennell was attorney the same way.

Q. Never mind that. Answer the question.

A. I simply know that he was.

Q. Well, how?

A. I know that he was attorney for my friends.

Q. How do you know?
A. From McDeid's doing the work, and my friends telling me so,—from talking with them on the subject.

Mr. FENNELL: Who furnished the money?

Mr. JOHNSTON: Never mind that. Just keep quiet. That is
487 all you know about it.

A. I furnished some of the money to pay. I know that.
Q. Have you told us all you know? If you can tell us how you know it.
A. I could tell a good deal more.
Q. Well, tell us more then.
A. I have seen the contracts between the parties—seen the bills paid by them.
Q. Have you got any of them?
A. Not as I know of.
Q. Have you told us all you know about it?
A. I could tell a good deal more if I had a little time to think.
Q. That is all you can tell us now?
A. I don't say so.
Q. Say so one way or the other?
A. I know he was the attorney employed by all the homesteaders and that he had the matter in hand.
Q. Can you tell us anything more about it? I want to know what you know about it.
A. Give me some definite question and I can answer it.
Q. Do you claim that you do not understand the question the question I asked you? Tell what you know about his being attorney for them.
A. I know he was attorney.
Q. I asked you how you know it?
A. I know it by his being employed; I attended to the work for my mother and a sister of mine I had business connection with Mr. Smaal and I know he was employed by him and others.
Q. You had business connection with Mr. Smaal? Do you know what Mr. Smaal was doing?
A. Yes, sir.
Q. Now, what was he doing all the time?
A. I know that he was like them on the homestead.
Q. That is what you are contending for?
A. Not this one; our title comes down from him and the others.
Q. He was about the earliest one to settle there?
A. Amongst the earliest.

488 *Testimony of Mrs. Sarah A. Smale,*

a witness produced by the defendant, Kean, being duly sworn, testified as follows:

Examined by Mr. FENNELL:

Q. What is your name?
A. Sarah A. Smale.

Q. Where do you reside?
A. 124 Dekalb street, Chicago.
Q. Are you the wife of John A. Smale?
A. I am the widow of John A. Smale.
Q. When did John A. Smale die?
A. September 19, 1879.
Q. Mrs. Smale, will you please tell the court if you ever lived in the northern part of Lake county, Indiana?
A. I have.
Q. And if so, when and where and under what circumstances.
A. We moved there to the northern part of Lake county in 1874 and lived there until before my husband's death. I went to Beloit, Wisconsin, on account of death in the family.
Q. Where did you live?
A. I lived on the property known as Wolf Lake property—United States property, as we termed it,—we held it to be.——
Q. Will you describe the condition of the land at the time that you lived there? If she identifies those views, your honor, I shall offer them in evidence. Look at those views and state whether they correctly represent portions of Wolf lake that they purport to represent?
A. Yes; they do.
Q. We desire to offer those views—photographic views—in evidence. When were those views taken?
A. They were taken in 1875—either the fall of 1874 or in 1875.
Q. Will you tell the circumstances connected with them, the residents on those lands, tell the court the facts in your own words?
A. Tell the whole story?
Q. Yes, the reason of your going down there was because——

Objected to.

Ans. Well we went to Wolf lake believing it to be Government land.
Q. For what purpose did you go?
A. We went for a home.
Q. Did you take any legal steps towards acquiring a homestead there?

489 Objected to by plaintiff.

Q. What did you do?
A. We homesteaded the property. We took the property as a homestead, moved there in 1874.
Q. Who took the property as a homestead?
A. My husband and I and other parties later went down there.
Q. How many other parties? Who were they?
A. I have the names on an envelope that I might not forget.
Q. You may refresh your recollection from that.
A. John A. Smale, O. B. Felt, H. H. Felt, Sweno Kean, Jonathan Wilkins, Joseph M. Kean, William Killker, Robinson, William Wheeler, Charles Rose.

Q. State when those parties went there? What is the nature of the improvements they made in the way of cultivating?

A. These parties followed us in 1874; some of them moved along in the early spring of 1875 or winter of 1875. I find that by looking at papers I have in my possession since we went there. Some parties come down in February, 1875, and I see here——

Objected to.

A. Well I will say——

Q. Well, drop those ideas.

A. And each took up a home there and built a house and lived in it and made a garden.

Q. What was the character of the land that you cultivated?

A. The land was dry, sometimes too dry for a good garden near my house.

Q. Were there any trees there?

A. There were a good many trees,—trees by actual count of the rings, 200 years old.

Q. How large?

A. A good-size tree.

Q. Pick out the picture that shows your house that you talk about.

A. A part of this is Mr. Kean's; we changed when we first went down there in our homestead. A photograph of my house has been lost, having been placed in a vault for safe keeping and in some way was lost.

Q. Please look at the map now shown you. There is no picture here then relating to yours?

A. Not to my home.

Q. How much land did you cultivate?

A. Well, I don't know about the acres,—how many acres
490 there would be; there would be a number of acres cultivated.

Q. How many acres were there with trees around your house?

—. As to that I could not say in acres, but I would say there was a strip of land, a body of high, dry land that was cultivated I think for three-quarters of a mile,—I mean that we cultivated. There was much we did not cultivate. We were grubbing and plowing it.

Q. Was there at that time any part of the bed of either of those lakes south of what is called Wolf river or the neck of the lake that you could not walk over?

A. Do you mean was water so we could not walk through it?

Q. That is what I mean.

A. The men walked through there; the women did not usually.

Q. I will ask you to look at the picture now shown you and indicate on the map where that meadow was?

A. This is O. B. Felt's meadow looking south from there. (Indicating.)

Q. What lot?

A. Lot 5 is it not? Lot 5 or lot 1. He was on Wolf lake instead of Lake George.

Q. Take that map and tell us where it stood?

A. I would think there; yet as to that I cannot say.

Mr. FENNELL: The witness indicates a point about in the northwest quarter of the northeast quarter of section 13.

Q. Does that picture represent correctly what counsel terms the bed of the lake at that point?

A. Yes, this picture represents O. B. Felt's land. His house is on the other picture.

View 18 (excepting the writing upon the view) was now received in evidence and is as follows:

(Here follows photograph marked page 491.)

492 Q. Look at the view now shown you, No. 3, and tell us where the land is?

A. This land is somewhere here at the north; it would be probably about here; that is Gallagher's house,—that is showing the meadow and the timber land between Gallagher's house.

(The witness indicates a point in lot 5 of section 3 as Gallagher's house and at a point in the east 80 acres of the southwest quarter of section 18 as witness's house upon this view No. 3,—looking from one to the other.)

Mr. FENNELL: We offer this view No. 3 in evidence.

The view or photograph No. 3, was then admitted in evidence and is as follows:

(Here follows photograph marked page 493.)

494 Q. Look at the view now shown you and indicate on the map where that land was?

A. This view shows the land between Kean's house and Gallagher's. Kean's house was between Gallagher's and our house at that point.

(Witness indicates a point on the map, lot 6 of section 18, range 9.)

Mr. FENNELL: We offer this view No. 4 in evidence.

The view No. 4, as identified by the witness was admitted in evidence, and is as follows, to wit:

(Here follows photograph marked page 495.)

496 Q. Look at view 15 and tell us what that represents?

A. It is the gravel beach at the north end of the lake—at the north end of Wolf lake, between Wolf lake and Lake Michigan in township 38.

Mr. FENNELL: We offer this view in evidence.

And thereupon view No. 15 was received in evidence and it is as follows:

Mr. FENNELL: This in rebuttal of Mr. Rossiter's deposition as to the character of the land.

(Here follows diagram marked page 497.)

No. 47
Keau
v
Cau & Co
p. 491

Showing Chas. Kaui's house & land N. side
Sec 7. T 37 R. 7.

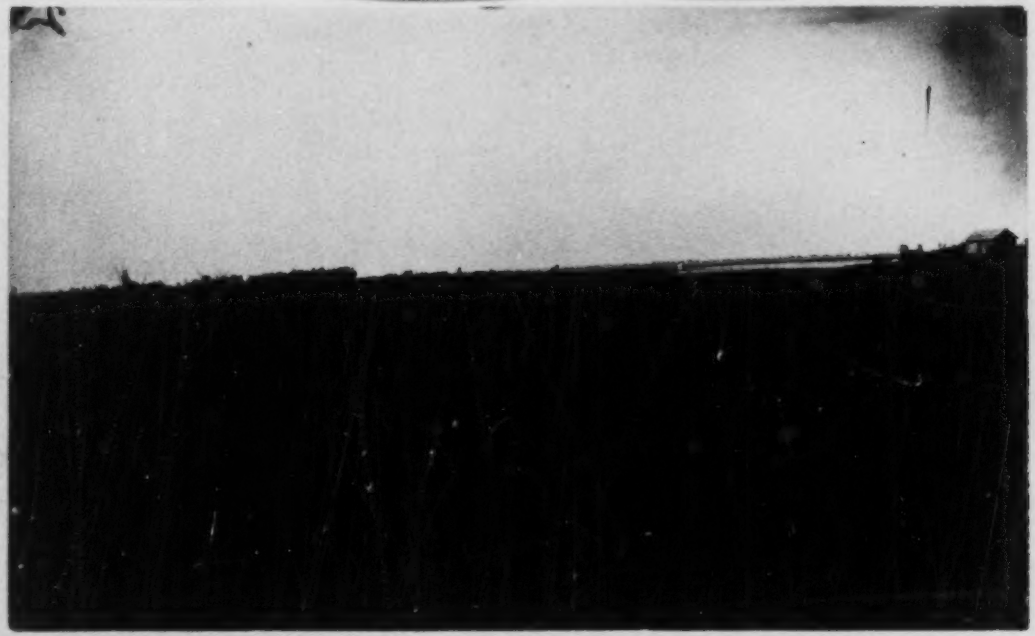
No 47
Keane
Canal Co.
1897

Showing Meadows & Timber Lines bet- W. C. Gallagher
House & Old Stable. Position 2 Rods East of Mr G's House
& showing Fence & Hill & Timber - Dec 18-97-9

Showing Meadows between Rain's & Tallacher's
Sec 18 - T. 37 - Range 9 - [illegible]

No 47
Kean & Canale
p 497

Sand & Gravel Beach at the North End of Wolf Lake between Wolf Lake & Lake Michigan. Town - 38 - Range 10 - Sec 1 —

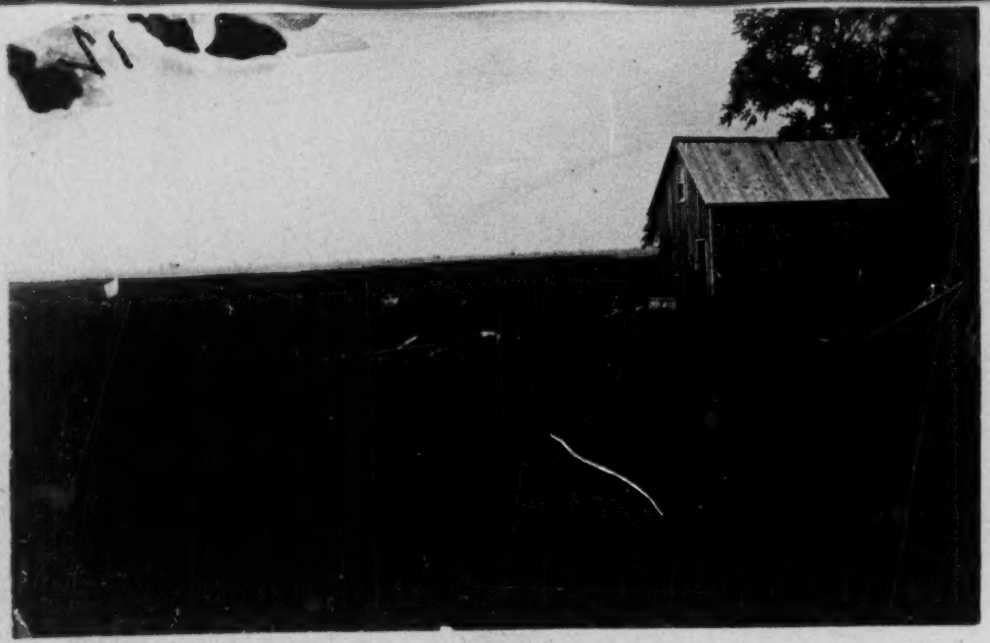


Showing Chas Rasi Dance from C. H.

showing O.B Felt meadows - Looking due South.
Secs. 12 & 13 - Town 37 - R 10 -

Showing North side of O.B Falls
Sec 12 & 13 of 37 - R. 11.

North Platte Project
Garden Co.



Showing O. P. Fell- House & meadows with family

498 Q. No. 1—what section is that?
A. Section 7.

Mr. FENNELL: We offer that in evidence for rebuttal of Mr. Rossiter's testimony as to the general character of the land.

Q. What view is this?
A. No. 2.

Mr. FENNELL: We offer that in evidence for the same purpose.
And thereupon views Nos. 1 and 2 were admitted in evidence and they are respectively in the words and figures as follows:

(Here follow photographs marked pages 499 and 500.)

501 Q. Look at picture 14 and tell me what that represents?
A. That represents the north side of O. B. Felt's land, section 12.
Q. Where is that on the map?
A. It would be north of O. B. Felt's house in Wolf lake.

Mr. FENNELL: We offer that picture in evidence.
And thereupon view No. 14 was received in evidence and it is as follows:

(Here follows photograph marked page 502.)

503 Q. Look at picture No. 12 and tell me what that represents?
A. O. B. Felt's house and meadow, view looking south of section 12.
Q. Where is that situated?
A. Section 12, 13, 24 in township 37.

Mr. JOHNSTON: You read it from that. Tell it so I can object.

Ans. I mean to say the house is not here.
Q. Please look at the map and tell me again where O. B. Felt's house stood.
A. It was between this strip of land, this land we held as Government land and this strip of land here.
Q. Is that a picture of his house?
A. That is a picture of his house and his family.

Mr. FENNELL: We offer this view in evidence.
And thereupon view No. 12 was admitted in evidence and is as follows:

(Here follows photograph marked page 504.)

505 Q. Look at view No. 5 and tell me what that represents?
A. That is the north end of what we call the island. Mrs. Kean's is looking west of section 18.
Q. Tell me about where that was on the map.

(Witness indicates a point in the northeast quarter of the northwest quarter of section 19.)

Mr. FENNELL: We offer this picture No. 5, in evidence.

And thereupon view No. 5 was admitted in evidence and it is as follows:

(Here follows photograph marked page 506.)

507 Q. Now, Mrs. Smale, have you indicated the position of those houses to the best of your recollection?

A. To the best of my ability I have.

Q. You have simply pointed out the position on the map?

A. So nearly as I could—as perfectly as I could.

Q. What does No. 5 represent?

A. The end of Elm island and Mrs. Kean's stacks looking due west.

Q. What is that mound in that picture?

A. That is a haystack.

Q. Hay cut on the bed of this lake?

Objected to by plaintiff and the court sustained the objection.

Q. Where was the hay cut?

A. It was cut on the island. We called it Government land.

Q. State whether or not it was in what is called the bed of Wolf lake or George lake?

Mr. JOHNSTON: Describe what it is. It may be a question what is the bed of Wolf lake or George lake.

Q. State whether it was within or without the lake line?

A. It was within. That hay was cut here. This is not water because you call it lake; it is high and dry land with large trees. As we come down here it is dry land as I would indicate it along this side. I think this is what is called George lake and Mud lake. Here is an island and trees upwards of a hundred years old.

Q. How deep is the water?

A. Of course I have lived on that land a good many years; it has been the bed of the lake years ago,—how many years I don't know, but a great many more years than I am old. From talking with those who have sounded the lake at many points I am led to believe——

Objected to.

Ans. It would be an average depth I would say of 15 inches at that time. I am talking of our lake—Mud lake.

Q. At what time?

A. In 1874.

Q. At the time those affidavits were made for a survey?

A. Yes, sir.

508 Q. Were all of those houses that you testified about within the bed of the so-called lake?

Objected to by plaintiff.

COURT: You have seen the plat of what purports to be Mud lake?

A. Yes sir.

Showing the Rock on Glen Island 4 miles from
with Yacht Rotary [illegible]

COURT: Were all of those houses within what purports to be Mud lake?

A. They were within what purports to be the bed of the two lakes; not all George lake because some are in Wolf lake.

Q. Which ones in Wolf lake?

A. O. B. Felt.

COURT: One?

A. One.

Q. What do these black dots on the maps represent? What objects, if any, were at those points?

A. I would say they were houses, all those who located out there, homesteaders.

Q. Now tell us what trouble, if any, you had there to retain possession, if you had any trouble with anybody?

A. Only Mr. Forsyth caused the arrest of my husband for trespass. He, I believe, was fined 25 dollars and cost.

Q. What did Mr. Forsyth do in regard to your house?

A. He tore it down and moved it away.

Q. What did you do?

A. Built it again better than ever. We built again better than ever.

Q. What did you do to Mr. Forsyth?

Objected to by counsel for plaintiff.

Mr. FENNELL: Mr. Forsyth testifies in a deposition that he went there and ejected by arms. I want to prove by this witness that he was arrested and fined $25. for doing it. I want to show the possession such as it was.

COURT: In order to hold title by prescription a person must hold it twenty years. The possession must not be interrupted for even a single moment.

Mr. FENNELL: Tearing down a man's house is not an interruption.

Q. Now please tell the jury, Mrs. Smale, what was the final outcome of this attempt by these various parties to obtain a homestead on this land?

Objected to by counsel for plaintiff.

509 Mr. FENNELL: I want to show the connection between the Sioux half-breed scrip title——

Q. Did you make any declaratory statement?

Objected to by counsel for plaintiff on the ground that the record is the best evidence of that fact.

Mr. FENNELL: I want to show that she attempted to put a declaration on file and they rejected it.

Q. Did you send a paper to Indianapolis with a view to homesteading this land?

Objected to.

Q. Did you send a paper to Indianapolis?——

A. We sent a paper to Washington and it was returned.

Q. Tell what was done, what you were going to do about it,—what you know about it?

A. The paper was a declaratory statement.

Objected to by plaintiff.

Q. What became of that paper?

A. The paper is right there in that envelope.

Q. How many papers are there? Are these the papers you had before you?

A. I don't know how many there are here or whether they are declaratory statements. I can show them one by one. These are the declaratory statements. This is our declaratory statement.

Q. Tell what became of it?

A. It went to Washington and the land not having been——

Objected to by plaintiff.

Q. Well, it went to Washington?

A. Yes.

Q. Then what became of it?

A. It was sent back.

Q. Why?

Objected to by counsel for plaintiff.

COURT: Was there some written communication with it?

A. There was.

Q. Look at the paper now shown you and tell me what it is?

A. Copy of a letter on file in this office.

Q. Where did you get that paper from?

A. We have taken care of it for twenty years.

Q. Where did you get it from?

A. From the auditor of State of the State of Indiana, E. Henderson.

510 Q. I asked you to tell me the final outcome of these attempts to hold homesteads? Tell what was done?

A. We wished to hold this land by homesteading and other parties who wanted to hold this land with half-breed scrip——

Objected to.

Q. They held by Sioux scrip.

Objected to by plaintiff and asked to be stricken out.

Q. Did these homesteaders ever withdraw their application?

A. We did.

Mr. JOHNSTON: How can she know what the others did.

Q. Do you know?

A. I do know; two were my brothers. We were naturally very closely associated in this work.

Q. Were the other applications withdrawn or not?

A. They were withdrawn.

Q. Did you enter into any agreement with any person with reference to the title to this land?
A. Yes, sir; we did.
Q. Is that agreement in writing?
A. Yes, sir.
Q. With whom?
A. With the attorney of the Sioux scrip.
Q. What is his name?
A. John S. Newman.
Q. From whom did you get your title to this land?

Objected to.

Q. Did you ever receive a deed to this land?

Objected to. The instrument would show. It might be one or another that she calls a deed.

COURT: Did you ever see what purported to be a deed, what you understood to be a deed?
A. I did.
Q. From whom did you receive it?
A. I have a writing written years ago. So I may not be mistaken may I read it?
Q. Certainly. You have a right to use a memorandum to refresh y ur recollection.
A. This is an agreement with H. O. McDeid.
Q. Who was H. O. McDeid?
A. He was attorney for all the homesteaders.
Q. Was there any agreement between the homesteaders and H. O. McDeid by which they were to prove their application and
511 take deed from McDeid for their respective land claimed?
. Objected to by plaintiff.

COURT: I have followed her evidence. This testimony of the witness shows that the possession was interrupted.

Mr. FENNELL: I want to show that Henry O. McDeid as attorney and agent of all parties compromised the different claims and deeded to Sarah Smale the land which she now claims. I claim an independent title in Sarah Smale. We expect to show that S. A. Kean furnished all the money. I will connect that and show that Henry O. McDeid was agent of both parties.

Q. Tell what you know about the settlement with McDeid? What was done——
A. I can best show that by a letter mailed at Washington.
Q. Tell what you know about it.
A. We were as homesteaders and found that it would be best to stop litigation. We accepted deeds from those who covered the land with Sioux scrip.
Q. Who furnished the money to build those houses you have testified about?
A. H. O. McDeid and S. A. Kean.
Q. When did you leave the possession of this land?

Objected to.

Q. How long did you live there?

A. We moved there on the 28 of February, 1874; we staid there, had my home there until after the house was torn down. It was torn down in 1881.

Q. Was any one left in possession of the land?

Objected to.

Q. If so, whom?

Objected to.

Q. Was there any one upon the land?

A. Yes, there was.

Q. Who was there?

A. Mr. Charley Kreuter and William Gallagher.

Q. Did you claim any interest in the land?

Objected to.

Q. Do you know what the circumstances were under which he moved there, staid there on the land?

A. As agent to care for the land. They were merely put there to take care of it.

Q. Do you know if he has been there from that time to the present time?

A. To the best of my knowledge he has; and Mr. Gallagher.

512 Cross-examined by Mr. JOHNSTON:

Q. What time did you say your husband died?

A. September 19, 1879.

Q. Mr. Forsyth ejected you there, too, didn't he?

A. I have my——

Q. Tore down your house?

A. Not the house; the temporary house was torn down.

Q. You didn't stay there long after the other house was built?

A. Yes, I did, your honor.

Q. Talk to the judge when you say "your honor." How long did you say you stay- there after he tore down your house?

A. If you will allow me to read this——

Q. Answer the question.

A. I was not there when the house was torn down.

Q. When was that house torn down?

A. The first of our settling upon the land was the 28 of February, 1874.

Q. He tore it down when?

A. Soon after we located on the land.

Q. Your husband was on the land at that time?

A. He was in the morning. I was there during the day; we staid there at night.

Q. He staid during the daytime?

A. No; we both lived there.

Q. Mr. Forsyth came down there and tore down your fences?

A. I was not there when there was any of this disturbance.
Q. He did not?
A. No.
Q. He ousted you from there?
A. Never.
Q. Did he sue you in the United States circuit court?
A. Yes.
Q. You knew that Forsyth objected to you holding any of this land and he objected right along?
A. I don't know that he objected right along.
Q. You knew that he commenced suit against you?
A. Yes.
Q. That was somewhere about 1878 or '7?
A. No.
Q. When was it?
A. I think it was earlier.
Q. What time would you say it was commenced?
A. I think the suit was begun in 1875?
Q. What time in 1875?
A. I can tell.
Q. Well, tell us when it was commenced?
A. The decree was June 6, 1879. The suit was begun
513 July 25, 1874—1874, according to the best of my judgment.
Q. The suit in Lake county,—speaking now of a suit in the United States court?
A. December 17.
Q. What year?
A. It is not given. I would think that was in 1875.
Q. The fences he had torn down frequently?
A. No sir.
Q. When did you move away from there?
A. I don't know that I could say I have ever moved away.
Q. Didn't you move away from there shortly after the decree in the Federal court was rendered?
A. No.
Q. Did your husband move before?
A. No.
Q. You had gone away before?
A. I didn't leave; my household goods were in the house; I hadn't left.
Q. How long did you leave them there?
A. They were until they were forcibly removed to William Gallagher's.
Q. Who forcibly removed them?
A. I was not there. I understood one Forsyth.
Q. That is Jacob Forsyth?
A. I understood they were taken away.
Q. Do you know when that was?
A. In the spring of 1880. I think it was after my husband's death.
Q. You speak about Kreuter. He did not live on this land?

A. He lived on the north half of the section. He took care of our house and William Gallagher.

Q. Where did William Gallagher live?

A. William Gallagher lived at the north end of George lake.

Q. Do you say that house of yours is standing there yet?

A. I said it was moved away to Gallagher bay. It was moved on the lake island.

Q. Who moved it?

A. That is I went out to see it and it was gone.

Q. How far was it moved away from where you had it?

A. It was on the same lot or island.

Q. How far was it moved away from where it was when you saw it?

A. They lived over a mile and a half from our house to Mr. Gallagher.

Q. Then it was up off the section 18? You say it was the
514 north end of Lake George?

A. Our house was moved to the north end of the lake.

Q. When was that done, as near as you can recollect?

A. If you will hand me the letter I can tell just when.

Q. State approximately?

A. 1880 or '81.

Q. There has been nobody living on that land since then?

A. There has been in the person of Mr.——

Q. Was not living on the north end of the section?

A. He was living in the house known as Mr. Kean's house.

Q. That is the north end of section 18?

A. I knew that he lived on that land. I know that he lived in the house called the Kean house.

Q. You spoke about being able to wade across these lakes? Is that a fact?

A. The men I said waded across. The women did not.

Q. The lake is two or three feet deep?

A. In some places.

Q. Take it where you lived and passed into the lake; before you reached the other side it was about seven feet deep?

A. I don't know the depth sir. I have seen my brother wade across. I never measured the depth.

Q. You ladies did not try to wade across?

A. No.

Q. What season of the year was it?

A. We lived there the year around.

Q. They did not wade in the winter time?

A. I saw one that waded in the winter time; he was walking right along and broke through.

Q. You say Gallagher is living there yet?

A. He is not now.

Q. How long has he been gone?

A. I don't know just when he left it.

Q. The north end?

A. Yes, sir.

Q. Mr. Kreuter you say took care of your land?
A. I hope.
Q. What did he do?
A. We had——
Q. Tell us what he did.
A. He cared for it, looked after it.
Q. What did he do? What were the acts that he did?
A. I think he would cut the hay. I had a very good garden. I had grapes and I had fruit trees to care for them.
515 Q. Don't you know for a good many years there has not been a single garden?
A. Yes; I went out there last summer. Mr. Kreuter did what services I asked of him.
Q. What were they?
A. To care for my property; to see that no trespassers took possession of it.
Q. You did not see a vestige of a fence there? They laid there to the commons when you visited there last summer?
A. When I visited there last year?
Q. Can you answer the question whether it laid to the commons.
A. I don't know.
Q. There was no fence around it?
A. I didn't think it was necessary.
Q. There was a commons; that whole country laid open?
A. I think Mr. Kreuter protected them.
Q. Was there a fence on the south end of section 18?
A. As to that I cannot say. I don't know whether the garden fence was torn down.
Mr. FENNELL: Where were you when the decree was entered at Indianapolis in the case of Forsyth against John A. Smale?
A. I was at Indianapolis.
Mr. FENNELL: Was John A. Smale living then?
A. John A. Smale was dead.
Mr. JOHNSTON: She says John A. Smale died in September, 1879.
A. Yes.
Mr. FENNELL: I asked you if you were at Indianapolis when the case of Forsyth against Smale was decided by Judge Gresham,—Forsyth *vs.* Smale in June, 1879?
A. No.
Q. When were you in Indianapolis?
A. November, 1881 I was in Indianapolis.
Q. For what purpose?
A. To attend court.
Q. For what purpose?

Objected to by plaintiff on the ground that it is immaterial.

Q. What if anything, was done after the decree was entered in that case?
A. After judgment was rendered there was an order entered vacating the judgment and granting a new trial.

Objected to by plaintiff.

516 Q. Did John A. Smale leave any minor heirs?
A. He did.
Q. What are their names?
A. John B. Smale.
Q. How old is he now?
A. 29.
Q. Any others?
A. One is a minor, Jesse A. Smale.
Q. How old is he?
A. 20 years.
Q. Where does he reside?
A. He is at school in Beloit, Wisconsin.
Q. Where was he born?
A. He was born on this land.
Q. More than twenty years ago?

Objected to by plaintiff.

Q. When was he born?
A. September 18, 1875.
Q. Are those all the heirs?
A. Four children.
Q. How many of them are minors?
A. One.

517–537 *Offer of Patents.*

Mr. FENNELL: I offer in evidence the original patents, with the endorsements thereon, from the United States to the various grantors of Anna S. Kean.

To the introduction of which plaintiff, by counsel objected, but the court overruled the objection and allowed the patents to be read in evidence.

And the said patents were then read in evidence, with the endorsements thereon, and are respectively in the words and figures following:

* * * * * * *

538 & 539 COURT: Is there any objection made to the evidence introduced concerning the field-notes?

Mr. JOHNSTON: No; that was waived.

Mr. MCMAHAN: No objection to the certificate. The objection is as to the legality of them on the ground that sections 12 and 13 was unsurveyed land. No objection made to the form of the certificate.

And all parties in this cause now rest.

And this was all the evidence in this cause.

* * * * * * *

540 And this was all the evidence given in this cause.

And the defendants, in said cause now present this their bill of exceptions and pray that the same may be examined, approved, signed, sealed and made a part of the record herein, but the court

not having time now to carefully examine the same, takes it under consideration for examination and approval this 25th day of February, 1896.

And after having examined the above bill of exceptions and finding the same to be correct it is now approved, signed sealed and made a part of the record herein, this 7 day of October, 1896.

JOHN H. GILLETT, *Judge.*

Filed Oct. 7th, 1896.

E. L. WILSON,
Clerk P. C. C.

541 STATE OF INDIANA, }
Porter County. }

I, Ed. L. Wilson, clerk of the Porter circuit court in said State do hereby certify that the above and foregoing transcript contains true and complete copies of all papers and entries in said cause.

And I further certify that on the 22d day of February, 1896, the sworn reporter who took down the evidence in said cause filed in my office his longhand manuscript thereof, which is the same manuscript of the evidence incorporated in the bill of exceptions, made a part of the foregoing transcript.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Valparaiso, this 12th day of October, 1896.

[SEAL.]

E. L. WILSON,
Clerk of the Porter Circuit Court.

542 STATE OF INDIANA, }
Porter County. }

In the Porter Circuit Court.

THE CALUMET CANAL AND IMPROVEMENT COMPANY }
vs. }
CHARLES B. ALEXANDER ET AL. }

The clerk will prepare and certify a full and complete transcript of all the proceedings and papers on file and judgment in the above-entitled cause, to be used on appeal to the supreme court. In preparing said transcript the clerk will certify the original longhand manuscript of the evidence taken in said cause and filed in your office on the 22d day of February, 1896 and incorporated in the bill of exceptions filed in this cause.

WILLIS C. McMAHAN,
Attorney for Henry B. Mason.
W. P. FENNELL,
Attorney for Kean & Kean.

543 The supreme court. Henry B. Mason *et al. vs.* Calumet Canal and Imp. Co. Filed Oct. 20, 1896. Alex. Hess, clerk.

544 In the Supreme Court, May Term, 1896.

HENRY B. MASON ET AL., Appellants,
vs.
THE CALUMET CANAL AND IMPROVEMENT COMPANY, Appellee.
} Agreement to Submit Appeal for Trial.

We hereby submit the appeal in this cause upon the separate and several assignments of errors, for trial hereby expressly waiving all notices required by law to be given by the parties appealing to their co-parties in the lower court, or to the appellee.

WILLIS C. McMAHAN,
Attorney for Henry B. Mason.
W. P. FENNELL,
Attorney for Samuel A. & Annie R. Kean et al.
WILLIAM JOHNSTON,
Attorney for The Calumet Canal and Improvement Company, Appellee.

545 In the supreme court. Henry B. Mason, *et al. vs.* Calumet Canal and Imp. Co. Joinder in assignments of error. Filed Oct. 20, 1896. Alex. Hess, clerk.

546–552 STATE OF INDIANA:

In the Supreme Court, May Term, 1896.

HENRY B. MASON ET AL., Appellants,
vs.
THE CALUMET CANAL AND IMPROVEMENT COMPANY, Appellee.
} Answer to the Several Assignments of Errors.

Filed Oct. 20, 1896. Alex. Hess.

The appellee for answer, to the several assignments of errors herein filed by the appellants, says; that there is no error in the judgment or proceedings of the court below.

Wherefore it prays that the judgment be in all things affirmed.

WILLIAM JOHNSTON,
Attorney for Appellee.

* * * * * * *

553–559 Appellants,
vs.
THE CALUMET CANAL AND IMPROVEMENT COMPANY, Appellee.

The appellant, Henry B. Mason, says that there is manifest error in the judgment and proceedings of the lower court in this: That the court erred in overruling the said Henry B. Mason's motion for a new trial.

Wherefore, the said appellants pray that the judgment of the lower court may be in all things reversed.

WILLIS C. McMAHAN,
Att'y for Appellant.

Filed Oct. 20, 1896.
ALEX. HESS.

* * * * * * *

560-566 Appellants,
vs.
THE CALUMET CANAL AND IMPROVEMENT COMPANY, Appellee.

The appellant, Annie R. Kean, says that there is manifest error in the judgment and proceedings of the lower court in this: That the court erred in overruling the said Annie R. Kean's motion for a new trial.

Wherefore the said appellants pray that the judgment of the lower court may be in all things reversed.

WILLIAM P. FENNELL,
Att'y for Appellant Annie R. Kean.

Filed Oct. 20, 1896.
ALEX. HESS.

* * * * * * *

567 Appellants,
vs.
THE CALUMET CANAL AND IMPROVEMENT COMPANY, Appellee.

The appellants Annie R. Kean, Samuel A. Kean, Orson Felt, Henry Felt, Sarah A. Smail and Charles Kreuter, severally say that there is manifest error in the judgment and proceedings of the lower court in this: That the court erred in overruling the said appellants' Kean and Kean, Felt and Felt, Smail and Kreuter's several motion- for a new trial.

Wherefore the said appellants pray that the judgment of the lower court may be in all things reversed.

WILLIAM P. FENNELL,
Att'y for said Appellants.

Filed Oct. 20, 1896.
ALEX. HESS.

568 And afterwards, to wit: on the 14th day of December, 1896, come the appellants by counsel, and file six copies of appellants' brief herein.

And afterwards, to wit: on the 16th day of December, 1896, comes the appellant, Mason, by counsel, and files five copies of his statement and brief.

And afterwards, to wit: on the 24th day of March, 1897, the appellee, by order of court, was required to file its brief within twenty (20) days.

And afterwards, to wit: on the 14th day of April, 1897, comes the appellee by counsel, and files two copies of appellee's brief.

And afterwards, to wit: on the 22nd day of April, 1897, come the parties by counsel, and file their joint petition to advance herein.

And afterwards, to wit: on the 12th day of May, 1897, come the parties by counsel, and the court being advised in the premises, overrules the joint petition to advance heretofore filed herein.

And afterwards, to wit: on the 24th day of November, 1897, come the appellants by counsel, and file dismissal as to Henry B. Mason.

And afterwards, to wit: on the 8th day of December, 1897, the court being advised in the premises, dismisses the appeal herein as to the appellant Henry B. Mason.

569 And afterwards, to wit: on the 26th day of April, 1898, being the 134th judicial day of the November term, 1897, come the parties by their attorneys, and the court being advised in the premises, affirms the judgment of the court below, with the following opinion pronounced by Howard, chief justice:

570 HENRY B. MASON ET AL.
v.
THE CALUMET CANAL AND IMPROVEMENT COMPANY. } No. 18097.

From the Porter circuit court.

HOWARD, *C. J.*:

This was an action brought by appellee against appellants and others, to quiet title to certain real estate described in the complaint, and situated in S. ½ section 18, and section 19, township 37 N. range 9 W. and in sections 12, 13 and 24, township 37, N. range 10 W. in Lake county. The lands in controversy, together with other lands, were conveyed to the State of Indiana by the United States under the swamp-land act of 1850, and by the descriptions of the Government survey of 1834. By the same descriptions, the lands were conveyed by the State to the remote grantors of appellee. Part of the lands are included in what was once the bed of Wolf lake and the bed of Lake George, but since the survey the waters have, in large measure, receded, leaving the lake beds comparatively dry land.

In 1875 certain persons under the assumption that the beds of the lakes had not been surveyed in 1834, procured a resurvey of that part of the lands formerly covered by the waters, and it is through this last survey, and the sales made in pursuance thereof, that appellants claim title. The case before us, therefore, in so far as concerns source of title, does not differ from that of Kean *v.* Roby, 145 Ind. 221. On the authority of the decision in that case, there can be no question that the resurvey of 1875, as also the sales made thereunder, were wholly invalid, and, consequently, that appellee's title as based upon the original survey of 1834, and the sales made under that survey, is good. No real distinction in this regard has been shown between the two cases.

The second contention is that the action is barred by the fifteen and the twenty years' statute of limitation. This contention is plainly

founded upon the same theory as the first, namely, that the appellants
obtained some title or took possession of some kind under the
571 void survey of 1875. As to title, as we have seen, there was
none. As to possession, the court heard the evidence and did not find, nor can we perceive, that the continuous and lawful possession of appellee and its immediate and remote grantors was ever broken by the unauthorized entrance, if any there was, on the part of appellants or any of them. Appellee and its grantors continued to pay the taxes assessed on the lands, by the descriptions in their deeds, coming down from the original Government survey, and had at all times such possession of and exercised such dominion over the territory as was possible in the case of wild, wet and uncultivated lands. As said by this court, in Worthley *v.* Burbanks, 146 Ind. 534, it is manifest that as to adverse possession there can be no absolutely unvarying rule with reference to every kind of real estate. The requirement as to the kind of occupancy of or dominion over land which is necessary to show adverse possession in the case of a cultivated farm, a town lot or a residence in a populous city, may be quite inapplicable or even impossible in the case of a piece of desert land, a mining claim, a non-navigable lake, a prairie or a forest. The evidence in this case, as we think, was sufficient to show continuous possession by appellee and its grantors of the lands in controversy. The appeal as to Henry B. Mason has been dismissed on his petition, and the contentions made in the brief filed in his behalf need not therefore be considered.

Judgment affirmed.

572 And afterwards, to wit: on April 23, 1900, come the appellants by counsel, and file their petition for a writ of error to the Supreme Court of the United States, and bond.

And on the same day, come the appellants by counsel, and file their assignment of errors in the Supreme Court of the United States.

And on the same day, the petition for writ of error was submitted to the court and granted and the bond approved.

And on the same day, to wit: come the appellants by counsel, and file a writ of error from the Supreme Court of the United States.

And on the same day, the supreme court of Indiana issued a citation thereon.

573–579 STATE OF INDIANA:

In the Supreme Court.

No. 18097.

* * * * * * *

580 Appellants,
vs.
THE CALUMET CANAL AND IMPROVEMENT COMPANY, Appellee.

Petition for Writ of Error.

To Honorable John V. Hadley, chief justice of the supreme court of Indiana:

581 The appellants, Annie R. Kean, Samuel A. Kean, Henry Felt, Orson B. Felt, Sarah A. Smail & Charles Kreuter and each of them separately, pray that a writ of error from the Supreme Court of the United States to the supreme court of Indiana in the above-entitled cause may be allowed by your honor as chief justice of the supreme court of Indiana, and for cause thereof alleges:

That by the record, opinion and judgment in said cause it appears that the decision of the said supreme court of the State of Indiana, is against the title and right to certain real estate specially set up and claimed by the appellants. Annie R. Kean, Samuel A. Kean, Henry B. Felt, Austin Felt and Sarah A. Smale, under the statutes, patents, deeds of conveyances and authority of the United States of America, and that therefore questions are presented by the record, opinion and judgment herein which are properly cognizable by the Supreme Court of the United States.

Wherefore, petitioners pray for an allowance of the writ of error from the Supreme Court of the United States to the supreme court of the State of Indiana as before stated and that your honor will sign the citation thereon.

WILLIAM P. FENNELL,
Counsel for Appellants, Plaintiffs in Error.

April 23d, 1900.—Granted.
JOHN V. HADLEY, *C. J.*

582 [Endorsed:] No. 18097 Indiana supreme court Petition for writ of error. Filed Apr 23 1900 R. A. Brown clerk.

583 Filed Apr. 23, 1900. R. A. Brown, Clerk.

UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the supreme court of the State of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said supreme court, before you, between The Calumet Canal and Improvement Company and Annie R. Kean, Samuel A. Kean, Henry Felt, Orson B. Felt, Sarah A. Smale and

Charles Kreuter a manifest error has happened to the great damage of the said Annie R. Kean *et al.* as by their complaint appears: And it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 23d day of May next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Seal Circuit Court of the United States, District of Indiana.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court this 23d day of April A. D. 1900.

NOBLE C. BUTLER, *Clerk.*

584–590 UNITED STATES OF AMERICA:

In the United States Supreme Court.

* * * * * * *

591 Appellants, Plaintiffs in Error,
vs.
THE CALUMET CANAL AND IMPROVEMENT COMPANY, Appellee, Defendant in Error.

Citation.

592 To the Calumet Canal and Improvement Company:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, D. C., thirty days after the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Indiana, wherein Annie R. Kean, Samuel A. Kean, Henry Felt, Orson B. Felt, Sarah A. Smail and Charles Kreuter, are plaintiffs in error, and you are defendant in error, to show cause if any there be, why the opinion and judgment rendered against the said plaintiffs in error, as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John V. Hadley, chief justice of the supreme court of Indiana, this 23rd day of April, in the year of our Lord one thousand nine hundred.

JOHN V. HADLEY,
Chief Justice.

I hereby acknowledge service of the above citation this — day of April, A. D., 1900.

——— ———.

593–599 Filed Apr. 23, 1900. R. A. Brown, Clerk.

UNITED STATES OF AMERICA:

In the Supreme Court.

No. —.

* * * * * * *

600 Appellants,
vs.
THE CALUMET CANAL AND IMPROVEMENT COMPANY, Appellee.

Assignment of Errors.

601 The appellants, Annie R. Kean, Samuel A. Kean, Henry Felt, Orson B. Felt, Sarah A. Samil and Charles Kreuter, complains to the Supreme Court of the United States of America and say that there has been manifest error in record, judgment and proceedings of the circuit court for Porter county in the State of Indiana, and in the supreme court of the State of Indiana in this cause, and specifically assigns the following, to wit:

1. The circuit court of Porter county, State of Indiana, erred in that the findings and judgment of the court are not sustained by sufficient evidence.

2. The circuit court of Porter county, State of Indiana, erred in that the findings and judgment of the court are not sustained by law.

3. The circuit court of Porter county, State of Indiana, erred in its conclusions of law.

4. The circuit court of Porter county, State of Indiana, erred in overruling appellants' motion for a new trial.

5. The supreme court of the State of Indiana, erred in affirming the judgment and decision of the circuit court for Porter county, State of Indiana.

6. The supreme court of the State of Indiana erred in holding that the original survey of the United States made in 1834, pursuant to an act of Congress passed on the 2nd day of March, 1833, included all the sections comprising the bed of Wolf lake, situated in the State of Indiana.

7. The supreme court of Indiana erred in holding that the original survey of the United States made in 1835, pursuant to an act of Congress passed on the 2nd day of March, 1833, included all of fractional section fifteen (15); lots number three (3) and four (4), survey of 1835 of section eighteen (18), the same being all of the south half of said section; lots one (1), two (2), three (3)
602 and four (4); the southeast quarter (S. E. ¼) of the northeast quarter (N. E. ¼) and the southeast quarter (S. E. ¼), survey of 1835, of section nineteen (19), the same being the whole of said

section, all in township thirty-seven (37), north of range nine (9) west in Lake county and State of Indiana, and also

Lots three (3) and four (4) survey of 1834 of section twelve (12), the same being all of the south half of said section; lots one (1) and two (2) survey of 1834, section thirteen (13), the same being the whole of said section; lots two (2) and three (3) and the northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) and the southeast quarter (S. E. ¼) of the southeast quarter (S. E. ¼) survey of 1834, of section twenty-four (24), the same being the whole of the north half of said section; and the northwest quarter of the southwest quarter (S. W. ¼) and the southeast quarter (S. E. ¼) of the southeast quarter (S. E. ¼) of said section; excepting and reserving from said above description the following tract lying, being and situate in sections twenty (20), twenty-one (21) and twenty-eight (28), to wit: Commencing at a point on the east line of Indiana boulevard, where the center line of section twenty (20) in township thirty-seven (37), north of range (9) west, intersects the same, and running thence east along said center line to the quarter post on the east line of section twenty (20), thence southeasterly in a straight line to the southeast corner of the north half of the northwest quarter (N. W. ¼) of section twenty-eight (28), in township thirty-seven (37), range nine (9) aforesaid; thence west on the south line of said north half of the northwest quarter (N. W. ¼) of section twenty-eight (28), to the east line of said Indiana boulevard to the point or place of commencement, containing one hundred and sixty acres, excepting and disclaiming any interest in or to all those parts of sections twelve (12), thirteen (13), eighteen (18), nineteen (19) and twenty-four (24) mentioned in said
603 description which are east, south or west of the meander line of the beds of Wolf and George lakes, all in township thirty-seven (37), north of range ten (10) west, in Lake county in the State of Indiana.

8. The supreme court of the State of Indiana erred in holding and deciding that the original survey made by the United States in 1835, pursuant to and act of Congress passed on the 2nd day of March, 1833, extended over both the land and water of the following-described real estate in Lake county, State of Indiana, to wit: fractional section fifteen (15); lots number three (3) and four (4), survey of 1835 of section eighteen (18), the same being all the south half of said section; lots one (1), two (2), three (3), and four (4); the southeast quarter (S. E. ¼), of the northeast quarter (N. E. ¼) and the southeast quarter (S. E. ¼), survey of 1835, of section nineteen (19), the same being the whole of said section, all in township thirty-seven (37), north of range nine (9) west in Lake county and State of Indiana, and also lots three (3) and four (4) survey of 1834 of section twelve (12), the same being all of the south half of said section; lots one (1) and two (2) survey of 1834, section thirteen (13), the same being the whole of said section; lots two (2) and three (3) and the northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) and the southeast quarter (S. E. ¼) of the southeast quarter (S. E. ¼), survey of 1834, of section twenty-four (24), the same being the whole of the north half of said section; and the northwest quarter

(N. W. ¼) of the southwest quarter (S. W. ¼) and the southeast quarter (S. E. ¼) of the southeast quarter (S. E. ¼) of said section; excepting and reserving from said above description the following tract lying, being and situate in sections twenty (20), twenty-one (21) and twenty-eight (28), to wit: Commencing at a point on the east line of Indiana boulevard, where the center line of section twenty (20) in township thirty-seven (37), north of range nine (9) west, intersects the same and running thence east along said center line to the quarter post on the east line of section
604 twenty (20), thence southeasterly in a straight line to the southeast corner of the north half of the northwest quarter (N. W. ¼) of section twenty-eight (28), in township thirty-seven (37), range nine (9) aforesaid, thence west along the south line of said north half of the northwest quarter (N. W. ¼) of section twenty-eight (28), to the east line of Indiana boulevard to the point or place of commencement, containing one hundred and sixty acres, excepting and disclaiming any interest in or to all those parts of sections twelve (12), thirteen (13), eighteen (18), nineteen (19) and twenty-four (24) mentioned in said description which are east, south or west of the meander line of the beds of Wolf and George lakes, all in township thirty-seven (37), north of range ten (10) west, in Lake county, in the State of Indiana.

9. The supreme court of the State of Indiana erred in holding that the following-described real estate, to wit: all of fractional section fifteen (15); lots number three (3) and four (4), survey of 1835, of section eighteen (18), the same being all of the south half of said section; lots one (1), two (2), three (3) and four (4) the southeast quarter (S. E. ¼) of the northeast quarter (N. E. ¼) and the southeast quarter (S. E. ¼), survey of 1835 of section nineteen (19), the same being the whole of said section, all in township thirty-seven (37), north of range nine (9) west in Lake county, State of Indiana, and also

Lots three (3) and four (4), survey of 1834 of section twelve (12), the same being all of the south half of said section; lots one (1) and two (2) survey of 1834, section thirteen (13), the same being the whole of said section; lots two (2) and three (3) and the northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) and the southeast quarter (S. E. ¼) of the southeast quarter (S. E. ¼) survey of 1834 of section twenty-four (24) the same being the north half of said section; and the northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) and the southeast quarter (S. E. ¼) of the southeast quarter (S. E. ¼) of said section, ex-
605 cepting and reserving from said above description the following tract lying, being and situate in section- twenty (20), twenty-one (21) and twenty-eight (28), to wit: Commencing at a point on the east line of Indiana boulevard, where the center line of section twenty (20) in township thirty-seven (37), north of range nine (9) west, intersects the same, and running thence east along said center line to the quarter post on the east line of section twenty (20), thence southeasterly in a straight line to the southeast corner of the north half of the northwest quarter (N. W. ¼) of section

twenty-eight (28) in township thirty-seven (37), range nine (9) aforesaid, thence west on the south line of said north half of the northwest quarter (N. W. ¼) of section twenty-eight (28) to the east line of said Indiana boulevard to the point or place of commencement, containing one hundred and sixty acres, excepting and disclaiming interest in or to all those parts of section- twelve (12), thirteen (13), eighteen (18), nineteen (19) and twenty-four (24) mentioned in said description which are east, south or west of the meander line of the beds of Wolf and George lakes, all in township thirty-seven (37), north of range ten (10) west in Lake county, in the State of Indiana, including that covered by the waters of Wolf lake as well as the perfectly dry land on the borders of said lake, passed to the State of Indiana, from the ownership of the United States of America, by the swamp-land act of 1850, the same being the act of Congress passed on the 28th day of September, 1850.

10. The supreme court of the State of Indiana erred in holding that the survey made by the United States of America in 1875, of Wolf lake and the lands under the bed of said lake, in the State of Indiana, pursuant to an order of the Commissioner of the Land Office of the United States on the — day of —— 1874, was a nul-ity for the reason that the said real estate situated under the bed of said lake, had previously passed into the ownership of the State of Indiana.

606 11. The supreme court of the State of Indiana erred in holding that the appellants, Annie R. Kean, Samuel A. Kean, Henry Felt, Orson B. Felt, Sarah A. Smail and Charles Kreuter, gained no title to the following-described real estate situated in the State of Indiana, to wit: That portion of the real estate described in the complaint filed in this cause, lying, being and situate within the meander lines of the beds of Wolf and George lakes, in township thirty-seven (37), north of ranges nine and ten (10) west, State of Indiana as said meander lines were established and constituted by the surveys of the United States of America, by reason of and through certain conveyances of the United States of America, to the grantors of these appellants made on the — day of ——, pursuant to an act of Congress approved on the 17th day of July, 1854.

12. The supreme court of the State of Indiana erred in holding that the Land Department of the United States of America had no jurisdiction to determine the validity of the title of these appellants and of their grantors in and to the following-described real estate, to wit: That portion of the real estate described in the complaint filed in this cause, lying, being and situate within the meander lines of the beds of Wolf and George lakes, in township thirty-seven (37), north of ranges nine and ten (10) west, State of Indiana as said meander lines were established and constituted by the surveys of the United States of America, for the reason that at the time the said real estate had been previously disposed of.

Wherefore, the appellants pray that the said record, proceedings and judgment be in all things reversed.

WILLIAM P. FENNELL,
Counsel for Plaintiffs in Error.

606½ [Endorsed:] No. —. United States Supreme Court. Assignment of errors. Filed Apr. 23 1900 R. A. Brown clerk.

607 STATE OF INDIANA:

In the Supreme Court.

HENRY B. MASON, FAY CALHOUN MASON, His Wife; Annie R. Kean, Samuel A. Kean, Her Husband; Sarah A. Smale, *et al.*, Appellants,
vs.
THE CALUMET CANAL AND IMPROVEMENT Company, Appellee.

No. —. Filed Apr. 23, 1900. R. A. Brown, Clerk.

Appeal Bond.

Know all men by these presents that we Sarah A. Smale, Henry F. Felt, Annie R. Kean and Samuel A. Kean as principals & Rob't A. Kean and W. H. Latta as surety-s are held and firmly bound unto the Calumet Canal and Improvement Company in the sum of five hundred dollars to be paid to the said appellee, to which payment well and truly to be made we bind ourselves jointly and severally and our heirs, and each of our heirs, executors and administrators jointly by these presents.

Sealed with*out* our seals and dated this 20 day of April, 1900.

The condition of this obligation is that whereas the above-named appellants have prosecuted their writ of error to the Supreme Court of the United States to reverse the finding and judgment rendered in the above-entitled suit by the circuit court, for the county of Porter, and State of Indiana, and the supreme court of the State of Indiana heretofore rendered in the above-entitled cause, now therefore if the above-named appellants shall prosecute their said
608 writ of error to effect and answer all costs and damages that may be adjudged or awarded against them if they shall fail to make good their plea, then this obligation shall be null and void otherwise in full force and effect.

HENRY F. FELT.
SARAH A. SMALE. [SEAL.]
ANNIE R. KEAN. [SEAL.]
SAMUEL A. KEAN. [SEAL.]
ROBERT A. KEAN. [SEAL.]
W. H. LATTA.

Approved this 23d April, 1900.
JOHN R. HADLEY, *C. J.*

[Endorsed:] Filed Apr. 23 1900. R. A. Brown, clerk.

609 STATE OF INDIANA, }
Supreme Court. }

I, Robert A. Brown, clerk of the supreme court of the State of Indiana, certify the above and foregoing to be a full, true and complete transcript of the record of proceedings had, papers filed, (excepting briefs), motions decided, rulings made, opinions delivered, judgments rendered, and all decrees and orders entered in the supreme court of Indiana in the above-entitled cause; also the original writ of error from the Supreme Court of the United States to the supreme court of Indiana in this cause and the original citation to the defendant in error, and the *the* original assignment of errors in the Supreme Court of the United States on said writ of error and original cost bond.

Which said transcript, annexed hereto and hereby returned, together with said original writ of error and original citation and original assignment of errors and original cost bond, I hereby certify as and for my full return to said writ of error.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court of Indiana, at the city of Indianapolis, this 23rd day of April, 1900.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

ROB'T A. BROWN,
Clerk of Supreme Court.

610 In the Supreme Court of the United States, October Term, 1900.

ANNA R. KEAN ET AL., Plaintiffs in Error,
vs.
THE CALUMET CANAL & IMPROVEMENT COMPANY, Defendant in Error. } No. 260.

Now comes Anna R. Kean *et al.* plaintiffs in error by William P. Fennell their attorney, and under the rule of the court thereto pertaining says that they intend to rely upon the following errors committed by the supreme court of Indiana, and designate the assignment of errors at page — of the record and the following parts of the record to be printed which are necessary and material to enable the court to pass upon the issues involved in the above-entitled case.

The clerk will print the following parts of the record:

From pages 1 inclusive to page 2 down to and including the words "to wit:" in the eleventh line from the bottom of said page.

Print: Beginning at the 4th line on the 25th page, "and thereupon &c.," and print down to and including the words "to wit:" on the 16th line of said page 25.

Print: Begin on page 35 with the words "Affidavit for change of venue" and print to the end of the page.

611 Begin at the 9th line from the bottom on page 40 and print to the end of page 41.

Begin at the top of page 42 and print the first six lines.
Begin at top of page 47 down to end of page 53.
Print the 15th and 16th lines on page 59.
Print the last line on page 66.
Print from the 2nd to the 5th line both inclusive on page 73.
Begin with 9th line from bottom on page 78 and print down to and inclusive the 21st line on page 79.
Print the 86th page.
Print the 7th and 8th lines of page 93.
Print the 99th page.
Print last 4 lines on page 105.
Print first 13 lines on page 111.
Print pages 118 and 119.
Begin at top of page 126 and print down to and include the 22nd line on said page.
Print first 16 lines of page 133.
Begin at top — page 140 and print to end of page 171, inclusive.
Begin at top of page 252 and print down to the red lines across page 288.
Print pages 391 and 392.
Begin at top of page 416 and print to page 517 inclusive.
Print page 538.
Print page 540 to 546 inclusive.
Print the last 13 lines of page 553.
" " " " 560.
" " 15 " 567.
Print from top of page 568 to end of 4th line on page 573.
612 Print from and including last 7 lines on page 580, to end of 2nd line on page 584.
Print last 7 lines on page 591 to end of 2nd line on page 593.
Print from and including last 5 lines on page 600 to end of page 609.

WM. P. FENNELL,
Attorney for Anna R. Kean et al., Plaintiffs in Error.

613 In the Supreme Court of the United States, October Term, 1900.

ANNA R. KEAN ET AL., Plaintiffs in Error,
vs.
THE CALUMET CANAL & IMPROVEMENT COMPANY, Defendant in Error.

To W. O. Johnston and C. E. Kremer, attorneys for defendant in error:

You and each of you are hereby notified that I have this day filed with the clerk of the Supreme Court a designation of the assignment of errors upon which I intend to rely and such parts of the record as I deem necessary to be printed in the above-entitled case and enclose herein a copy thereof.

WM. P. FENNELL,
Attorney for Anna R. Kean et al., Plaintiffs in Error.

DISTRICT OF COLUMBIA, } ss:
City of Washington, }

William P. Fennell being first duly sworn on oath says that he deposited in the mail at Washington, D. C., a copy of the above and foregoing notice and designation of parts of record to be printed properly stamped and addressed to W. O. Johnston and C. E. Kremer, attorneys for defendant in error at their respective offices in Chicago, Ills., this 21st day of July, 1900.

WM. P. FENNELL.

Sworn to and subscribed before me this 21st day of July, 1900.

[Seal of John J. McGrain, Notary Public, Washington, D. C.]

JOHN J. McGRAIN,
Notary Public.

614 [Endorsed:] Supreme Court U. S. File No. 17,730. Indiana sup. ct. Term No. 616. Oct. term 1900. Anna R. Kean *et als.* pl'ffs in error *vs.* The Calumet Canal & Improvement Company def't in error Designation of parts of record to be printed. Wm. P. Fennell, att'y for pl'ffs in error.

615 [Endorsed:] File No. 17,730. Supreme Court U. S. October term, 1900. Term No. 47. Annie R. Kean *et al.*, P. E. *vs.* The Calumet Canal & Improvement Co. Designation by plaintiffs in error of parts of record to be printed. Office Supreme Court U. S. Filed Jul- 21, 1900. James H. McKenney, clerk.

Endorsed on cover: File No. 17,730. Indiana supreme court. Term No. 47. Annie R. Kean *et al.* plaintiffs in error, *vs.* The Calumet Canal and Improvement Company. Filed April 25th, 1900.

Ct. Of. Exhibit 47.

Motion to continue.

Filed Mar. 28, 1901.

Office Supreme Court U.S.
FILED
MAR 28 1901
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 260.

ANNA R. KEAN,
Plaintiff in Error,
vs.
THE CALUMET CANAL AND IMPROVEMENT COMPANY,
Defendant in Error.

File No.

MOTION FOR CONTINUANCE.

WM. P. FENNELL,
SOLICITOR FOR PLAINTIFF IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1900.

No. 260.

ANNA R. KEAN,
Plaintiff in Error,
vs.
THE CALUMET CANAL AND IMPROVEMENT COMPANY,
Defendant in Error.

File No.

MOTION FOR CONTINUANCE.

And now comes Anna R. Kean, by Wm. P. Fennell, her counsel, and prays the court to continue the above entitled case until the next term of this court.

WM. P. FENNELL,
Solicitor for Plaintiff in Error.

MAY IT PLEASE THE COURT:

The plaintiff in error, Anna R. Kean, owing to her poverty, has heretofore been unable to pay the estimated cost of printing the record in this cause.

This case is almost identical in substance with the case of *Anna R. Kean* v. *Edward Roby et al.*, No. 16,920 of this court, which was dismissed on the call thereof because the plaintiff in error had not paid the cost of printing the record.

The two cases involved portions of the bed of Wolf Lake, in Indiana.

It is believed that plaintiff in error has a meritorious case, and if the court will continue the case to the next term she will make strenuous efforts to pay the amounts called for by the clerk.

In such cases, a dismissal of the case amounts practically to a denial of justice to poor litigants, and it is hoped that the court will be lenient and grant the continuance as prayed for.

Respectfully submitted.

WM. P. FENNELL.
Attorney for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

Anna R. Kean,
Plaintiff in Error,
vs.
The Calumet Canal & Improvement Company,
Deft. in Error.

To W. O. Johnson, 615 Rookery, Chicago,
and Wm. Johnson, Valparaiso, Ind.,
Attorneys for Deft. in Error.

Please take notice that I shall present the foregoing motion for continuance to the court in the Supreme Court room in the Capitol Building at Washington, D. C., on Monday, the 8th day of April, 1901, at which time you can be present if you so desire.

WM. P. FENNELL,
Attorney for Plaintiff in Error.

Received a copy of the above this ..... day of March, 1901.

.....
Atty. for Deft. in Error.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Wm. P. Fennell, being first duly sworn, on oath says he served the foregoing notice on Wm. Johnson, Esq., by mailing a copy thereof to him, properly addressed to him at Valparaiso, Indiana, on the day of March, 1901.

Sworn to and subscribed before me this day of March, 1901.

.....
Notary Public.

No. 47.

Brief of Fennell for

Filed Oct. 14, 1901.

Office Supreme Court U. S.
FILED
OCT 14 1901
JAMES H. McKENNEY,
Clerk.

No. 47.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1901.

ANNA R. KEAN ET AL.,
Plaintiffs in Error,

vs.

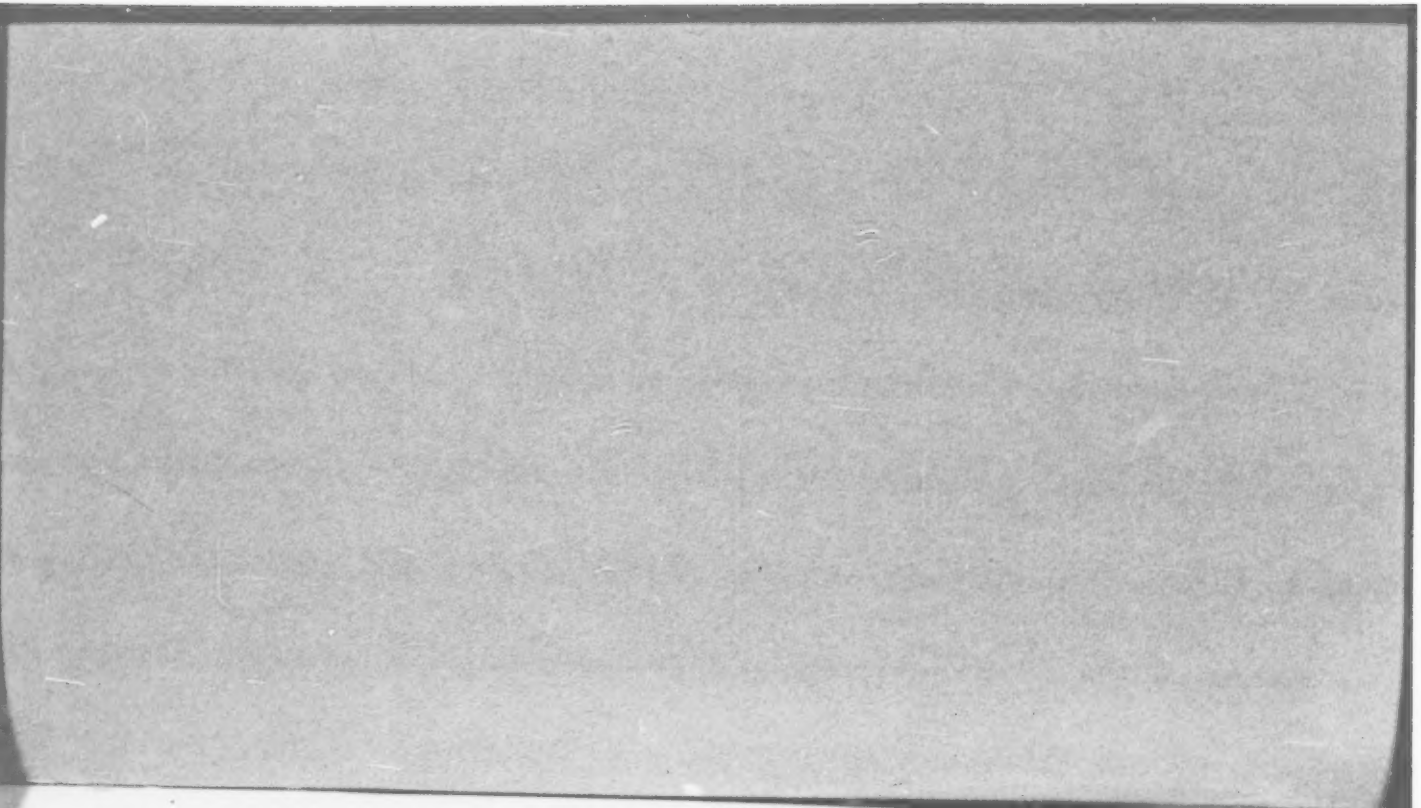
THE CALUMET CANAL & IMPROVEMENT COMPANY,
Defendant in Error.

Error to the Supreme Court of Indiana.

BRIEF FOR PLAINTIFFS IN ERROR.

WILLIAM P. FENNELL,
ATTORNEY FOR PLAINTIFFS IN ERROR.

BARNARD & MILLER PRINT.



IN THE

Supreme Court of the United States.

OCTOBER TERM A. D. 1901.

No. 47.

ANNA R. KEAN ET AL.,
Plaintiffs in Error,

vs.

THE CALUMET CANAL & IMPROVEMENT COMPANY,
Defendant in Error.

Error to the Supreme Court of Indiana.

Brief for Plaintiffs in Error.

STATEMENT.

MAY IT PLEASE THE COURT:

The defendants below sued out this writ of error.

There have been two cases pending in this court, involving the title to portions of the bed of Wolf Lake in Indiana, *Kean v. Roby*, which involved all that part of the lake north of the center of Section 12, and *Kean* v. *Calumet Canal & Improvement Company*, which involves all of the bed of Wolf Lake south of the center of Section 12 and Lake George. The former case was dismissed under the rule owing to the inability of the plaintiff in error to pay the estimated cost of printing the record. The case of *Kean* v. *Roby* was argued orally in the Supreme Court of Indiana and an elaborate opinion was ren-

dered. This case, *Kean* [*or Mason*] v. *Calumet Canal & Improvement Company*, was not argued orally and the opinion was simply affirmed on authority of *Kean* v. *Roby*. Consequently it is in the opinion of *Kean* v. *Roby* hereto annexed that we must look for the errors upon which, we respectfully submit, this case should be reversed.

The defendant in error is the owner of the lots around the rim of the lakes, as shown by the original survey of 1834, and the plaintiffs in error are the owners of the lots in the bed of the lakes under patents issued under the Wolcott survey of 1876.

The facts are sufficiently stated in the opinion of the Supreme Court of Indiana in *Kean* v. *Roby*. The court will observe that Wolf Lake lies partly in Indiana and partly in Illinois, and is the same lake involved in a suit which has already been before this court in *Hardin* v. *Jordan*, 140 U. S., 371. The court will observe that the Supreme Court of Indiana bases its opinion exclusively on a certain construction of Sections 2395 and 2396, R. S. U. S. If its construction is right and applicable to the case the decision must stand; if wrong or not applicable it must be reversed. And this is purely a federal question. There are two leading cases in Indiana, *State* v. *Portsmouth Savings Bank*, 106 Ind., p. 459, which governs in cases relating to lakes or natural bodies of water around which meander lines were run, leaving the bed of the lake unsurveyed, which we contend is the fact in our case, and we rely exclusively on that case as being the law in Indiana and directly in point. The other case, also cited by the court in its opinion, is known as the Tolleston Club case, 141 Ind., 197, which relates not to lakes, but to a morass or marsh, and, as we hold, is not

the law of our case. The whole contention is as to which of those two cases governs in this case.

The issues are fairly joined and the facts almost undisputed.

It was admitted by the defendants below that the complainant below, defendant in error here, was the owner of the rim of the lakes as surveyed in 1834, and has been in possession thereof and had paid taxes thereon, and

It was admitted by the complainant below that the defendants had been asserting title to the beds of the lakes under the new survey since 1874, and had paid taxes thereon. (Rec., 97.)

"The Court: Is there any controversy but what the plaintiff and his grantors paid the taxes which were assessed against these lots which are numbered about the rim? And on the other hand, I suppose your people, some of them, paid taxes on the lake bed under this new survey.

Mr. Johnston: That is the fact about it.

Mr. Wood: I don't think there is any controversy about that.

Mr. Johnston: Then it is admitted that the plaintiff and its grantors under whom it claims title to those lots, paid the taxes from 1870 up to 1891, on all the lots which are numbered around the rim of the lakes, according to the descriptions that have been given.

Mr. Fennell: That will be admitted to the rim of the lake.

Court: They paid on the lots numbered about the rim of the lake.

Mr. Fennell: And the defendants paid the taxes on the lots numbered in the bed of the lake.

Court: Yes, claiming under the new survey, it being in reality a question as to the validity of the title to the property.

Mr. Johnston: Yes; that is right."

The defendant Kean also introduced certain tax deeds in evidence, which appear in the record at pages .

The defendant Mason had a tax title also, but no other interest in the case and has dropped out of it.

Wolf Lake is a natural lake, or pond, in the northern part of Lake County, Indiana, extending over into Illinois. It is about three miles long and one mile in width, running to a narrow neck at the northern part.

Over a greater part of its area the water is less than two feet deep, and over a large part of its area it is less than six inches. In some places the water is four or five feet deep, and in the neck of the lake, commonly called Wolf river, is was as much as fifteen feet deep. The condition of the lake is shown by actual survey and measurement in the map. All that is not dry land is to a large extent covered by vegetation—bull rushes, pond lilies, etc., and has been regularly assessed for taxes as land. The photographs in the record show that the waters have largely dried up and that houses have been built thereon. In one of these houses children of one of plaintiffs in error were born, one of whom is now about twenty-five years of age.

At the time of the original government survey of the township, made in 1834, a meander line was run around the margin of the lake, and upon the official plat the water indicated by the meander line was marked "lake," while the border land was divided into lots numbered 1, 2, 3, 4, 5, 6 and 7, Sec. 1, etc.

These border lots, as shown by the government plat, were selected by the State of Indiana under the Swamp Land Act of September 28, 1850, and a patent was issued by the United States to the State of Indiana. The plat was as much a part of the patent as if it had been incorporated therein.

The defendant claims to be the owner of those border lots by mesne conveyances from the State of Indiana, and by reason of such ownership of said border lots, they claim, and the court has so held, *that their title extends over the waters and bed of the lake.*

Lake George is just east of Wolf Lake, separated from it by a strip of land which was formerly a beaver dam and connected with it by an inlet running through this strip. Originally it was one body of water. About the time the case of *Kean* v. *Roby* was going through the courts, *Hardin* v. *Jordan* was being prosecuted in the United States Circuit Court to settle the title to the Illinois side of the lake. That case was originally decided by the late Judge Gresham against the pretentions of the so-called riparian owners. It was taken to the Supreme Court of the United States, and there it was held that that court was bound to follow the decisions of the State Court on a question involving a rule of property within the state, and "it seemed," so the court said, "that in *Illinois* the owner of the bank held to the center of the lake." Next in order came the decision of the Supreme Court of Indiana in *Kean* v. *Roby*, that the portion of the lake involved in that case was all surveyed land, although as a matter of fact the record showed that it was the deepest part of the lake, in one place seventeen feet deep at that time.

Then came a final decision by the Supreme Court of Illinois that Wolf Lake was *a public water course* not subject to private ownership, and that the rights of the public must be conserved therein.

It is hoped that this appeal will settle the plain truth that it is a natural pond in which the waters have largely dried up, that it was so in 1874, just as is now, and that it is identical with the Beaver Lake case in principle and fact. Water is now pumped into the lake to make ice.

See Record, page 83.

The question of possession is about the only question of fact about which there has been any controversy.

Defendant in error has introduced evidence for the purpose of showing that it has been in possession and so on. All such pretentions are in vain. They knew exactly the strength or the weakness of their claim to the bed of the lake, and hence cannot take any advantage of their possession of the lots around the rim. Their possession, such as it was, was no greater than that of plaintiffs in error. It is true that the defendant cut ice from the lake in the winter, and equally true that the plaintiff in error had leased it for hunting purposes, had a tenant in possession, so far as actual possession could be obtained.

In behalf of the plaintiffs in error (defendants below) it is contended that they had been in open and notorious adverse possession since 1874. The history of the settlement on these lands by the appellants is lucidly given in the testimony of Sarah Smale. (Rec., 107.)

Originally they settled there as homesteaders before the beds of the lakes were surveyed. It was upon their

application, supported by affidavits, that the survey was ordered, and right there this conflict began. Forsyth, the then owner of the rim of the lake, grantor of the defendant in error, contested the matter before the Interior Department at Washington, and the matter was delayed two years, after which time the survey was approved. Henry O. McDaid, Esq., acting as attorney for all the parties, persuaded them to abandon their homestead entries and allow the lands to be taken up with Sioux Half-Breed scrip, which was done. Patents were issued later to the various scrip-holders and conveyances made to each person according to his or her respective undivided interests. Houses were built on the land and a regular system of home-making was entered upon. See photographs (Rec.,). Children were born and reared in those houses, one of whom, the son of Mrs. Smale, is now about twenty-five years old.

All this is set forth in detail by Mrs. Smale. Charles Kreuter was put in possession of the entire premises as lessee, and is there now and will hold possession until the final decision of this case. (Rec., .)

In behalf of defendant in error, complainant below, it was contended that our possession was spasmodic and intermittent, and that the complainant had really been in possession of all that part of the premises which was capable of being reduced to actual possession.

This case differs from the case of *Kean* v. *Roby*, in the following essential particular:

1st. In this case we were defendants below. The complainant must recover, if at all, upon the strength of its own title.

BRIEF.

Under Section 2396, U. S. R. S., the original survey of 1834 did in fact and in law stop at the "water course." Boundary stakes were driven on the margin of the lake and were found by the men who made the Wolcott survey in 1876 of the bed of the lake.

The survey of the state line was made several years before the survey of 1834, therefore the west line of the sections were not run by the survey of 1834, as supposed by the court, and in fact the state line was not actually run through the lake at all.

A survey made by proper officers of the United States and confirmed by the land department cannot be shown to be inaccurate by collateral attack in the courts. * * * *Russell* v. *Maxwell Land Grant Co.*, 158 U. S., 253.

The fact that the survey under which the patents issued was contested at every step by the interested parties and was finally decided after six months' consideration by the Secretary of the Interior affirming the decision of the land office affords strong evidence of its correctness and honesty.

United States v. *San Jacinto Tin Co.*, 125 U. S., 273.

Wolf Lake must be taken as a whole, not in sections. It is a lake between two states.

The Supreme Court of Illinois has finally held that Wolf Lake is a public water course.

Hardin v. *Jordan, supra.*

This case is identical in law and in fact with *Hardin* v. *Jordan*, 140 U. S., 379, only the rule of property is different in Indiana from what this court assumed to be the law in Illinois. *State* v. *Portsmouth Savings Bank*, 106 Ind., page 459.

As to the entire sections being considered surveyed, in legal effect, because corners were established, the very same state of facts existed as to the sections of land involved in *Hardin* v. *Jordan*. A plat will be found in the report (140 U. S.) at page 373, from which it will be seen that all of the sections surrounding that portion of the lake had three corners established, except section 30, which had two corners established. The same thing might happen, and no doubt has happened, in surveys of land bordering on the ocean and on Lake Michigan. In fact it is a geometrical impossibility to draw a circular line on a sectional map without leaving from one to three established corners unless the line be serpentine. This court held in *Hardin* v. *Jordan* that the lake was meandered and that the official records (field notes) show that the line was run around the margin of the lake.

The defendant in error must recover on the strength of its own title, just as in *Hardin* v. *Jordan*.

Reference to a Plat.

"By reference, the plat of the section made by the trustees in 1846 became a part of the conveyance as much so as if it had been copied into the patent deed. *Piper* v. *Connelly*, 108 Ill., 646; *Louisville & Nashville Railroad Co.* v. *Koelle*, 104 *id.*, 455." "And the rule of law is that when lands are purchased and conveyed in accordance with a plat, the purchaser will be restricted to the boundaries as shown by the plat. *McCormick* v. *Huse*, 78, see 363—citing *McClintock* v. *Rogers*, 11 *id.*, 279."

Swamp Land Act of Sept. 28, 1850.

Upon the question of the construction of the act of September 28, 1850, commonly called the Swamp Land Act, I know of no better authority than the case of the *State* v. *Portsmouth Savings Bank,* reported in 106 Indiana, page 435. In that case, after an exhaustive review of the authorities, the court said:

> "The correct doctrine to be gathered from the foregoing cases, and especially from the decisions of the Supreme Court of the United States, *which are authoritative upon the construction of federal statutes,* seems to be the following:
>
> "First, the Swamp Land Act of 1850, *ex proprio vigore,* was a grant in *presenti* to the states of all the swamp lands therein situated."
>
> "*Second,* whether or not any particular tract of land was or is swamp land within the terms of the grant, was and is a question for the decision of the Secretary of the Interior."
>
> "Third, *his decision upon that question, when once made, is final and conclusive, and cannot be questioned or overthrown by parole evidence."*
>
> "Fourth, it is not necessary that the decision of the Secretary, that any particular tract of land was or is swamp land, should be evidenced by a patent to the state. It is sufficient that the land has been *selected* as such, and the *selection is approved by that officer."*
>
> "Fifth, when such selection has been approved by that officer, and the particular tracts of land thus identified as swamp land, the title relates to the date of the grant, namely, September 28, 1850."
>
> "Sixth, a patent to the state of swamp lands issued by the Secretary of the Interior is evidence that the designated tracts are properly selected as swamp land, and fixes the title thereto as of the date of the Swamp Land Act, September 28, 1850."
>
> "Seventh, if the Secretary of the Interior has not

designated any particular land, *and has not decided to the contrary,* and neglects and refuses to act for the premises as against wrongful claimants, it may be shown by parole in behalf of the state or those claiming under it, that the land is in fact swamp land."

"While it may be that the state, in the absence of some statute of its own to the contrary, might convey its right to and interest in any particular tract of land before it is segregated as swamp land, and said segregation approved by the Secretary of the Interior, the title of such grantee would be liable to be defeated by a decision by that officer that such land was not, or is not, swamp land, within the meaning of the Swamp Land Act of 1850."

If defendant in error has not the paramount title to the land in question it is a mere intruder without title.

But the success of appellant in this case does not depend upon a construction of the act of September 28, 1850. Whether or not that act operated as a grant *in presenti* to the various states of all the swamp land within their borders is not the question before this court, unless it finds also that the title passed to the appellees *as riparian owners,* because if appellees have no title to the water, they are *mere intruders,* and *as to them,* the patents issued under the new survey *are conclusive* "that the lands were of the character which by the patents they were represented to be." Such is the doctrine laid down in *Wright* v. *Roseberry,* 121 U. S., 488, commenting upon the case of *Eberhardt* v. *Hogaboom,* 115 U. S., 67, the court say:

"This was the case of *Eberhardt* v. *Hogaboom.* There the *plaintiff* claimed by a patent issued to his grantor under the pre-emption laws. The defendant admitted he was in possession of twenty acres,

and contended that they were swamp and overflowed lands which passed to the state under the act of 1850. It appeared, however, that the certificate of purchase which he produced *did not embrace the lands in controversy,* and his offer to prove the character of the land as swamp and overflowed *by parole was rejected.* The court said: 'He was as to the twenty acres a mere intruder without claim or color of title. *He was therefore in no position to call in question the validity of the patent of the United States for these acres, and require the plaintiff to vindicate the action of the officers of the land department in issuing it.*"

"And again:

'It is the duty of the land department, of which the secretary is the head, to determine whether land patented to a settler is of the class subject to settlement under the pre-emption laws: *and his judgment as to this fact is not open to contestation in an action of law by a mere intruder without title.*' "

All presumptions are to be indulged in support of proceedings upon which a patent is issued and the patent is not open to collateral attack in an action of ejectment or a suit to quiet title. The title of the plaintiffs in error, being based upon a United States patent, is conclusive except as to one claiming under a paramount title. Therefore, whatever might be the conclusion of this court, if the state were a party to this suit, as between appellant and appellees, the patents issued under the new survey are the source of a valid title in plaintiff in error, unless the court reverses the rule laid down in the Portsmouth Savings Bank case and finds that the appellees take the bed of the lake as riparian owners.

In the case of *Eberhardt* v. *Hogaboom,* 115 U. S., p. 67, it was held that it is the duty of the Land Department,

of which the Secretary of the Interior is the head, to determine whether land patented to a settler is of the class subject to settlement under the pre-emption laws, and that his judgment as to this fact is not open to contestation in an action at law. What could be plainer than this statement, and it is as applicable to this case as it was to the case of *Eberhardt* v. *Hogaboom*. In that case the patent was issued under the pre-emption law; in this case under another act of Congress, authorizing the location of certain Indian scrip. The principle is the same in both cases.

The case of *The Iowa Railroad Land Company* v. *Antoine*, 52 Iowa, 429, is directly in point. Plaintiffs in that case claimed the title under a railroad grant, and introduced in evidence the certificate of purchase approved by the Secretary of the Interior. It was held that parol evidence was not admissible in behalf of the defendant, having no evidence of title to impeach the plaintiff's title by showing that the land was in fact swamp land, and hence passed under the prior Swamp Land Act. That case was cited with approbation and followed by the Indiana Supreme Court in the Portsmouth Savings Bank case.

Riparian rights have nothing to do with *the title to land under the water*. In *Diedrich* v. *The N. W. Ry. Co.*, 462 Wis., 262, the court said:

> "Riparian rights proper are held to rest upon title to the *bank* of the water, *and not upon title to the soil under the water.*"

It was evidently the intention of both the national and state governments to convey the border lands to the edge of the pond and according to the general rules of conveyancing if there is a discrepancy between the meander line

as indicated on the map and the actual water line, the natural monument which was intended by the parties to be the boundary, would be the boundary, and not the artificial meander line. Whether the meander line indicated the boundary line or not truly, is a question of fact. It may indicate the boundary line, and hence be a boundary line in fact, but having discovered where the boundary line was, supposing that the meander line correctly shows the water line, as it did in this case, then the boundary is fixed, and the subsequent recession, or drying up of the lake, would not extend the boundary line any more than the removal of a stone or a tree or any other natural monument which was fixed and agreed upon as a boundary.

There is no pretense, however, that the beds of Wolf Lake and George Lake have ever been selected as swamp land, and, on the other hand, it is not denied that the Secretary of the Interior has declared that the particular land in question was not swamp land within the meaning of the act of 1850 by issuing the patents under the Wolcott survey. So far as the decision of the Secretary of the Interior is concerned, this case has been before him upon appeal and patents having been issued, it is as to his department *res adjudicata.* If, as said by this court, his decision is final, and that question is settled for all time, therefore the court erred in permitting parol testimony over the objection of the defendant for the purpose of showing that the land in question was wet and overflowed land, and passed to the state under the act of 1850.

In 106 Ind., page 459, we find:

> "As we have before said, Bright and his grantees were bound to know that they had no title to the bed of the lake. The state has done nothing that would

justify a claim upon their part that they have been deceived or misled. Whatever they expended upon the bed of the lake, therefore, they must be held to have done it in the knowledge that the title to the land was in the state. They could not by thus improving the state's lands acquire title to them by estoppel." As to the title being in the state, it must be remembered that the court held that the act of January 11, 1873, operated as a selection or designation of the bed of Beaver Lake as swamp land. As the court held that the bed of Beaver Lake did not pass to the state by the act of January 11, 1873, it did hold that that act operated as a selection, and hence the title passed, as the Secretary of the Interior had not decided that it was not swamp land, or anything to the contrary, as in our case. The case was open for decision, but not so the Wolf Lake case, because the Secretary of the Interior had decided that it was not swamp land, and had allowed these patents to be issued upon appeal. Our case differs from the Beaver Lake case in that respect.

Again, upon the question of possession: The court says upon page 461:

"It was impossible for Bright to have had possession of the bed of the lake, unless he in some way had constructive possession, because during the time that he claimed to be the owner it was almost wholly covered with water. He had no grant from the state, nor had he anything else that gave him color or title. Whatever possession he may have had therefore was limited to the particular land over which he had exercised palpable acts of ownership."

Again, on page 463, the court reiterates:

"We have already seen that the grant of the border lands and the possession of them by Bright did not give him constructive possession of the bed of the lake. He is therefore not shown to have had any possession of the bed of the lake such as would put the statute of limitations in operation against the state."

Nothing could be clearer than that the Indiana Supreme Court has held in this case that the deeds of the border lands did not convey the bed of the lake to defendant in error.

And the court is not the less explicit upon the question of riparian rights. In the same case of Portsmouth Savings Bank the court says:

> "To grant the contention of appellee would be to hold that a grant from the state of a forty acre tract of overflowed and swamp land bordering upon a lake four miles in width, would take by the state's deed not only the forty acres, but in addition a strip of land as wide as the forty acre tract and two miles long. Without entering upon a review of the numerous cases upon the subject of riparian rights, we are very clear that the deeds or patents from the state to Dun and Condit carried to them no more of the swamp and overflowed lands than were included in the several surveyed subdivisions bounded by the lake."
>
> "As fully supporting our conclusions in this case, and upon the general subject of grants of lands bordering upon natural lakes, we cite the following authorities:
>
> *State of Indiana* v. *Milk,* 11 Federal Reporter, 389.
>
> *Boorman* v. *Sunnuchs,* 42 Wisconsin, 233.
>
> *State* v. *Gilmanton,* 9 New Hampshire, 461.
>
> *Seaman* v. *Bis,* 24 Illinois, 521.
>
> *Fletcher* v. *Phelps,* 28 Vermont, 257.
>
> *Mansur* v. *Blake,* 62 Maine, 38.
>
> *Wheeler* v. *Spinola,* 4 New York, 377.
>
> Angel Water Courses, Section 41.
>
> *Paine* v. *Wood,* 108 Mass., 160.
>
> *Diedrich* v. *North-Western U. R. W. Co.,* 42 Wisconsin, 248; American Reporter, 399."

The question of the approval of the Wolcott survey in 1874 of the bed of Wolf Lake was again before the Secretary of the Interior, the Hon. Carl Schurz, in the appeal of De Witt and Hardin. In deciding the appeal the Secretary said:

> "An application dated August 6, 1874, based upon affidavits, was made to your (Com. Gen. Land Office) office for a survey, under circular of July 1, 1874. Upon this application a survey was ordered, which was duly executed and approved by your predecessor December 31, 1874, a copy of the plat of which was soon after filed in the local office at Springfield."
>
> "Since the approval the tracts thus surveyed have been recognized and treated as public land, and claims have been initiated thereto in the usual manner, under general laws. * * * The tracts surveyed in 1834 and 1835 were disposed of long prior to the survey of 1874, *and owners of tracts that abutted upon the meander of the lake,* under the old survey, now claim the newly surveyed tracts as riparian owners. * * * To recognize riparian rights to these tracts would be equivalent to saying that the lands did not belong to the United States and that the survey is a nullity. * * * Your predecessor decided to order the survey upon consideration of the application therefor, and it was ordered *in pursuance of the regular practice of your office and of circular instructions for all surveys of that class of land.* The order of the survey, as well as the approval thereof, *involved a decision that the land belonged to the United States.*"

As to the Validity of the Patents.

The action of the Land Department in issuing a patent is conclusive in all courts and in all proceedings where by the rules of law the legal title must prevail. *Johnson* v. *Towsley,* 13 Wallace, 83.

In that case the court said:

> "That the action of the Land Office in issuing a patent for any public land subject to sale by pre-emption or otherwise is conclusive of the legal title, must be admitted under the principle above stated, and in all courts and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court or the essential character of the proceedings, no inquiry can be permitted into the circumstances under which it was obtained."

See, also,

Warner v. *Van Brunt,* 19 Wallace, 653.
Shepley et al. v. *Cowan et al.,* 91 U. S., 340.
Moore v. *Robins,* 96 U. S., 530.
Marquiez v. *Frisbie,* 101 U. S., 473.

In *Vance* v. *Van Brunt,* 101 U. S., 519, the court decided that even where false testimony or forged documents had been used before the department it would not affect the binding force of the decision.

In *United States* v. *Schurz,* 102 U. S., 401, the court said:

> "To the officers of the Land Department, among whom we include the Secretary of the Interior, is confided, as we have already said, the administration of the laws concerning the sale of the public domain." * * * "The question whether any particular tract belonging to the government was open to sale, pre-emption or homestead right is in every instance a question of law as applied to the facts for the determination of these officers. Their decision of such question and of conflicting claims to the same land by different parties is judicial in its character. It is clear that the right and duty of deciding all such questions belongs to these officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade up to the Secretary."

In *Smelting Company* v. *Kemp*, 104 U. S., 646, Justice FIELD, speaking for the court, said:

> "A patent in a court of law is conclusive as to all matters properly determinable by the Land Department where its action is within the scope of its authority; that is, where it has jurisdiction under the law to convey the land. * * * Indeed, the doctrine as to the regularity *and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid it would be presumed that such circumstances existed.* * * * If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives a court of law can afford no remedy to a party alleging that he is thereby aggrieved."

In *State* v. *Smelting Company*, 106 U. S., 447, the court said:

> "Whether there are rights thus interfered with which should preclude the location of the mine and the issue of a patent to him or his successor in interest, is, when not subjected under the law of Congress to the local tribunals, a matter properly cognizable by the Land Department when application is made to it for a patent, *and the inquiry thus presented must necessarily involve a consideration of the character of the land to which title is sought,* whether it is mineral, for which a patent may issue, or agricultural, for which a patent should be withheld. * * * Necessarily, therefore, it must consider and pass upon the qualifications of the applicant the acts he has to perform to secure the title, *the nature of the land and whether it is of the class which is open for sale.* * * * *The validity of a patent of the government cannot be assailed collaterally because false and perjured testimony may have been used to secure it.* Any more than a judgment of a court of justice can be assailed collaterally on like ground." (P. 453.)

In *Quinn* v. *Conlon*, 104 U. S., 421, the court said:

> "The courts cannot exercise any direct appellate jurisdiction over the rulings of those officers, or of their superior in the department in such matters, *nor can they reverse or correct them in a collateral proceeding between private parties.*" * * * "The question whether the land in controversy had been freed from its reservation under the Mexican grant so as to be open to settlement and pre-emption depended upon matters disclosed by the record of proceedings in the Land Department, namely, *that the public surveys had been extended over the land,* and that other lands had been appropriated to the satisfaction of the grant."

In *Baldwin* v. *Stark*, 107 U. S., 465, Mr. Justice MILLER, declaring the opinion of the court, said:

> "It has been so repeatedly held in this court, in cases of this character, that the Land Department is a tribunal appointed by Congress to decide questions like this, and when finally decided by the officers of that department the decision is conclusive everywhere else as regards all questions of fact that it is useless to consider the point further."

In *Cornell* v. *Lammers*, 21st Fed. Rep., page 200, the court said:

> "These field books shall be returned to the Surveyor General, who shall thereupon cause a description of the whole land surveyed to be made out and transmitted to the officers who may superintend the sale." * * * *"The object doubtless is to enable the officers in charge to determine whether the lands are patentable or not."*
>
> "Thus the government has provided means to enable the land officers *to determine the character of the land,* and whether or not they are of the character granted by the acts or authorized to be sold or otherwise disposed of. * * * *The sooner it comes to be a generally recognized principle that a United States patent, regular upon its face and upon the*

record, issued in the form prescribed by law, means something; that is, is unassailable collaterally, or even with success directly, by parties having the proper status, except upon clear and indisputable evidence, the sooner confidence in land titles will be re-established."

"There is no authority to issue a patent which in effect only says if the land herein described hereafter turn out to be agricultural lands, then I grant them, but if they turn out to be mineral [or swamp] lands, I do not grant them."

In *Wight* v. *Dubois,* Mr. Justice BREWER said:

"When the patent issues the title passes from the government, and no one can question that title who has not prior thereto himself acquired an interest in the land. It matters not what wrong the patentee may have perpetrated upon the government, it and it alone can complain. *In other words, when grantor and grantee are satisfied, a stranger has nothing to say."*

In *Cragin* v. *Powell,* 128 U. S., 593, Mr. Justice LAMAR said:

"That whilst lands are subject to the supervision of the General Land Office, the decision of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our Land Law, is settled by such a mass of decisions of this court that its mere statement is sufficient."

The case of *Gazzam* v. *Lessee of Elam Phillips et al.,* 20 Howard, page 374, is directly in point. In that case:

"The lessors of the plaintiff claimed title to the lot in dispute as heirs of James Etheridge, and gave in evidence a patent from the United States to their ancestors, dated 30th May, 1833, 'for the southwest

quarter section twenty-two, in township four south of range one, west, in the district of land subject to sale at St. Stevens, Alabama, containing ninety-two acres and sixty-seven hundredths of an acre, *according to the official plat of the survey of the said lands,* returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said James Etheridge.'

"The defendant claimed under William D. Stone, and gave in evidence a patent to him from the United States, dated the 17th December, 1832, 'for the south subdivision of fractional section twenty-two, same township and range, containing one hundred and ten acres and fifty one-hundredths of an acre, *according to the official plat of survey of the said lands,* returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said William D. Stone. This fractional part was divided *according to the plat by a line* running north and south through it, *laying off in the west subdivision 92.67 acres and in the east 110.57 acres.*"

"Etheridge purchased the west and Stone the east subdivisions."

"The sales in each case were made in conformity with the subdivision, as marked upon the plat of the Surveyor General then on file in the office, and to which all purchasers of the public land had access, and which constituted the guide of the Register and Receiver in making the sales."

"The lessor of plaintiff also gave evidence showing that the premises in question were within the southwest quarter of section twenty-two, computing the same according to the usual measurements of quarter sections, and that a full quarter might have been laid off from the fraction, and claimed that the whole of the southwest quarter had been appropriated to their ancestor, Etheridge, under the Pre-emption Act of 1830, which position was assented to by the court."

"The court also ruled that the purchase and patent of Stone, under whom the defendant claims must be

restrained to the fraction in the west part of the south-east quarter of section twenty-two, and that it gave him no right to the land in the south-west quarter."

In reversing this case the Supreme Court of the United States says:

"The effect of this ruling, when applied to this case, gave the heirs of Etheridge one hundred and sixty acres of the fractional section *in disregard of the official survey, the purchase and patent for only the ninety-two acres,* and reduced the one hundred and ten which Stone purchased and had a patent for to some forty-three acres."

"The court is of opinion this ruling cannot be maintained, for, conceding for the sake of the argument that the plat by the Surveyor General of this section was made contrary to law, the ground upon which this decision is sought to be maintained, and that Etheridge, under the Pre-emption Act of 1820 was entitled to purchase the whole of the southwest quarter, and to have it surveyed and patented to him, *yet it was not so surveyed, nor did he purchase nor has he obtained a patent for the same.* On the contrary, he purchased and paid for the west subdivision only of this fractional section, containing ninety-two acres, and *took out a patent for the subdivision.* And in addition to this Stone at the same time purchased the east subdivision as *laid down on the official plat,* and has secured a patent for the same and which includes the premises in question. * * * We deny altogether the right of the court in this action to go beyond these terms, thus explicit and specific, and, under a supposed equity in favor of Etheridge, arising out of the Pre-emption Laws, to the whole of the southwest quarter, enlarge the description in the grant, more accurately speaking, determine the tract and quantity of the land granted by this supposed equity *instead of by the description in the patent.*"

LAND CANNOT PASS AS APPURTENANT TO LAND.

In *Child* v. *Starr,* 4 Hill, 396, it is held:

> "A conveyance of one acre of land can never be made by any legal construction to carry another acre by way of incident or appurtenance to the first."

Such is the doctrine laid down in 2 Mct., 147; 8 *id.,* 260; 10 Pet., 25; 15 John, 447.

LIMITATIONS.

If this were an action of ejectment it would be barred by the statute of limitation on account of our twenty years' adverse possession. "An action to recover possession of realty must be within twenty years *after the cause of action accrued.* It does not mean twenty years adverse possession." *Vandugan* v. *Hepner,* 45 Ind., 589.

The scrip was located March 5, 1874, and possession was taken before the lake beds were surveyed. (Rec., *et seq.*) See also testimony of Mrs. Smale. But this being a suit to quiet title it is barred by the fifteen years statute. *Caress* v. *Foster,* 62 Ind., 145; *Milner* v. *Hyland,* 77 Ind., 458. (The syllabus in this case is somewhat misleading. The decision is, in effect, that the statute does not begin to run *until the cause of action accrues.*)

This being a bill to quiet title, it is barred by the fifteen year statute of limitations. Since we have constantly been asserting an adverse title and disturbing complainant's alleged possession. Whatever cause of action it had at the time of the filing of this bill accrued certainly more than fifteen years before, and in fact more than twenty years before.

Appellees lay stress upon the case of *Forsythe* v. *John A. Smale*. As to that case I would say that John A. Smale never had any title to this land. The title was in his wife, Sarah Smale. (Rec., .) Mr. Smale died about the time the decision was rendered, leaving minor heirs, one of whom has just become of age, and that decision could have been re-opened by this heir if it were necessary. But the doctrine held in that case by the United States Circuit Court is not the rule in such cases and is in direct conflict with the case of *State* v. *Portsmouth Savings Bank*, 106 Ind.

This case should be reversed.

Respectfully submitted.

WM. P. FENNELL,
Solicitor for Anna R. Kean et al.

APPENDIX.

To show that unnavigable lakes and ponds have always had a legal status distinguished from swamp land and streams and navigable waters, I subjoin the following extracts from the brief of my learned predecessor, the late Henry O. McDaid, Esq., filed before the Secretary of Interior at the contest over the approval of the survey:

LAKES & PONDS.

HUBERUS.

"Caeterum in lacibus et stagnis jus alluvionis non agnoscitur ait Callistratus in L. 12. De A. R. D. addita ratione quia et si crescunt et decrescunt retinent tamen suos terminos; cum quod per aestatem sit aridum hyeme rursus inundit; ab hanc inconstantiam in iis nullam accessionis vel decessionis rationem habendum, monet Alfenus in Lib. 24. Tit. Ult. De. aq. et. aque pluv."

Huberus Book 2. Tit 1. P. 25, Page 104.

HUBER.

"Furthermore this right of alluvion is not recognized in respect to lakes and ponds (or standing waters). Says Callistratus in Law 12. De. A. R. D. the reason being added that although these lakes and ponds increase and decrease, they nevertheless retain their own proper boundaries since though during the summer they may be dry, in the winter they are again overflowed, and on ac-

count of this changefulness Alfenus says there is is no reason for accretion or decretion in respect to them. Lib. 24. (last paragraph) de aque & aque pluv."

1 Huber, Book 2. Tit 1. Paragraph 25. Page 104.

ROMAN LAW.

"Lacus et stagna, licet interum crescant interdum exarescant, suos tamen terminos retinent; ideoque in his jus alluvionis non agnoscitur."

Digest Lib. 41. Tit 1. De. aq A. R. D. Section 12 Callistratus Lib. 2. Institutes.

Lakes and standing waters, although they sometimes increase, and sometimes decrease, nevertheless, retain their boundaries; therefore to these the right of alluvion is not to be allowed.

Definition of lakes and ponds.

ULPIAN Says "Lacus est quod perpetuam habet aquam stagnum est quod temporalem contineat aquam ibidem stagnantum quæ quidem aque plerumque hieme cogitur."

Digest Lib. 43. Tit. 14. Sec. 4.

"A lake is that which holds perpetual water. A pond is that which holds temporary and stagnant water, the waters of which, are most commonly indeed, collected in the winter.

FRENCH LAW.

Section 1566. "La loi n'etablissant le droit d'alluvion qu'a l'egard des rivieres (Art 556 Code Civ.) qui n'ont jamais de fixite absolue dans leur lit, il faut entirer la consequens que les lacs, dont la position est au

contraire constante et invariable, doivent conserver toujours leur limites, sans que le droit d'alluvion puisse avoir lieu sur leurs bords durant les saisons ou il y a decroissement dans leurs eaux:

Lacus cum aut crescerent aut descrescerent, nunquam, neque accessionem neque decessionem in eos vicinis licut.

L. 24. P. 3. de aq et aq pluv. Liber 39. tit 3.

Traite Du Domaine Publique Francais.

Proudon & Dumay Tom IV. Section 1566.

Section 1566. "As the law only establishes the right of alluvion in regard to rivers which have no absolutely fixed bed, we must draw the conclusion that lakes whose position on the contrary, is constant and invariable, must always keep their limits without the possibility of the right of alluvion on their borders during the seasons when there is a decrease in their waters."

Treatise of Proudon & Dumay on the Public Domain of France. Book 4. Section 1566.

The following from Alfenus is cited in support of the doctrine:

"Either when lakes increase or when they decrease, it is never permitted to the adjoining owners to have accession or decession in regard to them.

Sec. 558. "Alluvion does not take place with regard to lakes and pools, the owner of which always retains the soil which the water covers when it is at the heieght of running over from the pool, even when the mass of water happens to diminish. And reciprocally the owner of the

pool acquires no right upon the adjoining lands which his water may chance to cover in extraordinary floodings."

Barrett's code Napoleon. Sec. 558.

GERMAN LAW.

Fredrician Code.

The Fredrician code in defining what classes of cases the right of alluvion pertains to, says (Section 35):

"The acquisition of property by alluvion does not take place then,

1. When a certain number of acres, called *morgen,* or *buffen,* are assigned to the possessor of the ground enlarged by an imperceptible accretion: for, in this case, all that exceed the number of acres granted to him has no owner, (*est res nullius,*) and consequently belongs to our royalties.

2. When the accretion happens in rivers which belong to private persons; because the estates of private persons in which those *running waters* are also included, are usually separated by fixed boundaries, and consequently common to both neighbors, etc.

3. When they are still waters, which, having no current, may indeed rise or fall, but make no alteration in the banks."

Fredrician code. Book 1. Art. 7. P. 45.

AER LIMITATUS.

(Limited Fields.)

Lands which are limited by boundaries particularly assigned by lines of measurement are not entitled to alluvion and a *fortiori* to reliction.

This was a rule of the common law.

Bracton, an eminent common law author of the time of Henry III., says:

"Habet etiam locum haec in agris non limito: nam in limitis non habet ~~loque~~ locum jus alluvionis. Sunt autem limitatis qui assignatur aliquibus certis locus & certes terminis ubi scitur quid cui sit datum quid retentu & relictu. Praeter agris limitatis non cedit insula ratione in flumina publico immo conceditur occupanti et per consequens regi propter sua priveliquie.

Bracton Ed., 14 1569. Book 2. Chap. 2. P. 2 fol. 9.

"However, this does not apply in regard to limited fields; for it is said the right of alluvion does not pertain to limited fields.

Limited fields are those which are granted out by certain limits and certain boundaries, whereby it is known what is granted, to each one, and what is to be retained, and what is to be relinquished.

Moreover, in the case of limited fields, an island in the bed of the public river, is not to be given to the adjacent owner, the king possessing it by reason of his prerogative."

Fleta, a work written, it is supposed, by some one of the judges who were imprisoned in the Fleet prison by Charles I., announces the same common law doctrine as to limited fields stated by Bracton, viz.:

"Sed haec quae dicta sunt, locum habent in agris non limitatis; nam in limitatis non habet locis & terminis, ut sciant quod, & cuit datum sit, & quid retentum, & quid relictum."

Fleta, Lib. 3. Chap. 2. Sections 8 & 9.

"But those things which have been said do not apply to limited fields; for the right of alluvion does not apply to limited fields. Limited fields are those which are assigned to any one by certain limits and boundaries, so that they may know what is granted to each one, what may be retained, and what relinquished.

Fleta, Book 3. Chap. 2. P. 8.

GROTIUS.

"Frequens est inter vicinos populos contentio, quoties fiumen cursum mutavit, an simul et imperii terminis muteter et an que flumen adjacit eis cedant quibus adjecta sunt; quae controversiae ex natura et modo acquisitionis definiendae sunt. Docent nos mensores tria esse agrorum genera: divisum et assignatum quem limitatum vocat Florentinus Juriconsultus quia manufactos limites pro finibus habet, assignatum per universitatum sive mensura comprehensum puta per centurias ac jugera et arcifinium qui inde dictus docente Varone quod fines habeat arcendis hostibus ideneor, id est naturales: ut sunt flumina et montes. Hos occupatorios dicit Aggenus Urbicus quia plerumque tales sunt agri qui aut eo quod vacui sunt aut etiam bello occupantur. In duobus primis agrorum generibus etiam si flumen cursum mutet nihil de territoria mutatur: et si quid alluvio adjacit id occupantium imperio accedit."

Grotius de jure belli et pac. Lib. 2. Chap. 3. Sec. 16.

"Frequently there is contention between neighboring people when a river changes its course, whether at the same time the boundary of the domain is changed, and whether what is added by the river is given to those who are adjacent, which controversies ought to be determined

by the nature and mode of acquisitions. We are taught by law writers that there are three classes of lands, viz.:

1. Divided or assigned, which are called limited by Juriconsult Florentius because they have what is set out by limits for their boundaries.

2. What is assigned as a whole or if comprehended by measure, that is to say by hundreds or acres.

3. And arcifinial fields which it is said was taught afterwards by Varus which possess boundaries sufficient to keep out enemies, that is natural, such as rivers and mountains.

Aggenus Urbicus calls these occupatiore because most commonly these are lands which are vacant or occupied by reason of war. In the two first classes of fields, even if a river changes its course, nothing concerning the boundaries is changed: So the alluvion which is annexed is added to the Government first occupying it."

Grotius, Lib. 2. Chap. 3. Sec. 16.

GROTIUS.

"Sed populus ut aliis, ita et proxima praedia possedentibus jus illud concedere potest et concessisse haud dubie viditur si agri illi non alium finem ea ex parte quam naturalum id est flumen ipsum habeant Quare non contemnenda est hac in parte Romanorum diligentia qui limitatum agrum ab aliis agris distinxerunt dummodo meminerimus agrum mensura comprehensum hac in re paris juris, esse cum limitato, nam quae de imperiis supra diximus cum de eorum occupatione agerimus eadem in agris privatis obtinent; sed hoc adhibito descrimimine quod imperia in re dubia credenda sunt esse arcifinia quia

id territorii naturae maxime convenit at agri privati magis est ut arcifinii non credentur sed aut limitati aut certa mensura terminati quia hoc privatum possessionem naturae est congruentius."

Grotius de jure belli et pac. Lib. 2. Chap. 8. Sec. 12.

"But as the people have the power to grant this right to others possessing the adjoining lands, it seems, without doubt, to have been granted if these fields have no other boundary on that side than the natural boundary, that is, they have the river itself. However, the learning of the Romans on this point ought not to be disregarded, who distinguish limited fields from other fields, and we have seen that on this point the same law applies to lands comprehended in an expressed measure, as applies to limited fields. What we have said concerning the boundary of states, when treating of their occupation, obtains the same in regard to private fields, but this difference should be observed that in case of doubt, states are to be considered as arcifinial (having natural boundaries) because that is especially in accordance with the nature of states, but private fields are considered not arcifinial, but are limited or bounded by certain measure, because this is more in accordance with the nature of private possessions."

HUBERUS.

"Quae presumtio cessat in agris limitatis certo descriptis vel mensura expressa comprehensis quibus ultra eorum limitis ni hil incremento. Videtur."

1 Huberus. 123. Sec. 33.

"The presumption of which (The right of alluvion) ceases in respect to fields described by a certain boundary, or comprehended in a certain measure, beyond that

boundary or measure it appears that nothing is granted by way of accretion."

Huberus 1. Vol. P. 104.

ROMAN CIVIL LAW.

"In agris limitatis jus alluvionis locum non habere constat; idque et Divus Pius constituit. Et Trebatius ait agrum qui hostibus devictis ea conditione concessus sit, ut in civitatem venerit, habere alluvionem neque esse limitatum; agrumantem manucaptum limitatum fuisse ut sciretur quid cui datum esset quid veni esset quid in publico relictum esset."

Dig. Lib. 41. Tit. 1. Sec. 16.

"It is certain (or apparent) that the right of alluvion does not take place in limited fields. Divus Pius has ordered it so; and Trebatius says that a field taken from an enemy and granted on the condition that it should be the property of the city has the alluvion and is not limited, but that the field, which since it was taken has been limited in order that it might be known what was given to any one, what was sold, and what remained to the public, has not the right of alluvion."

Dig. Lib. 41. Tit. 1. Sec. 16.

Hennecius also states the same rule of law, viz.:

"Ita nullum dubium quia id quod agris nostris hoc modo accedit nobis quod agro publico *viaeve* adjicitur publico cedere debeat."

Heinnecius Jus. Nat. & Gent. Lib. 1. Chap. 9. Sec. 25.

See also Heinnecius Elementa Juris. Lib. 2. Tit. 1. Sec. 358.

NATURAL RIGHTS.

"Quaedam naturali jure communia sunt omnium quaedam publica: naturali jure communia sunt omnium haec aer aqua profluens, et mare, et per hoc littore maris."

Grotius de jure belli et pac. Lib. 2. Chap. 3. Sec. 9.

Grotius cites the digest of Justinian in support of this doctrine.

"Certain natural rights are common to all, certain others are public; the natural rights common to all are air, running water, and the sea, and the shores of the sea."

Grotius on the rights of war, etc., Book 2. Chap. 3. Sec. 9.

Erskine in his institutes of Scotch law, states what are common or natural rights: those incapable of appropriation by one individual,—that cannot be brought under the power of any one, viz.: light, air, *running water,* the sea.

APPENDIX.

[Kean or] Mason *et al.*
vs.
Calumet Canal & Improvement Co.

(Supreme Court of Indiana. April 26, 1898.) 150 Ind., p. 50; N. E. R., p. 85.

Appeal from Circuit Court Porter County. John H. Gillett, Judge.

Action by the Calumet Canal & Improvement Company against Henry B. Mason and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. C. McMahan, W. P. Fennell and W. H. Latta for appellants. W. O. Johnson and Wm. Johnston for appellee.

HOWARD, C. J. This was an action brought by appellee against appellants and others to quiet title to certain real estate described in the complaint, and situated in S. ½ Section 18, and Section 19, Township 37 N., Range 9 W.; and in Sections 12, 13 and 24, Township 37 N., Range 10 W., in Lake County. The lands in controversy, together with other lands, were conveyed to the State of Indiana by the United States under the swamp land act of 1850, and by the descriptions of the government survey of 1834. By the same descriptions the lands were conveyed by the state to the remote grantors of appellee. Part of the lands are included in what was once the bed of Wolf Lake and the bed of Lake George, but

since the survey the waters have, in large measure, receded, leaving the lake beds comparatively dry land.

In 1875 certain persons, under the assumption that the beds of the lakes had not been surveyed in 1834, procured a resurvey of that part of the lands formerly covered by the waters, and it is through this last survey and the sales made in pursuance thereof, that appellants claim title.

The case before us, therefore, in so far as concerns source of title, does not differ from that of *Kean* v. *Roby*, 145 Ind., 221; 42 N. E., 1011. On the authority of the decision in that case, there can be no question that the resurvey of 1875, as also the sales made thereunder, was wholly invalid, and consequently that appellee's title as based upon the original survey of 1834, and the sales made under that survey, is good. No real distinction in this regard has been shown between the two cases.

The second contention is that the action is barred by the fifteen and twenty years' statute of limitation. This contention is plainly founded upon the same theory as the first, namely, that the appellants obtained some title or took possession of some kind under the void survey of 1875. As to title as we have seen there was none. As to possession, the court heard the evidence and did not find, nor can we perceive, that the continuous and lawful possession of appellee and its immediate and remote grantors was ever broken by the unauthorized entrance, if any there was on the part of appellants, or any of them. Appellee and its grantors continued to pay the taxes assessed on the lands, by the descriptions in their deeds coming down from the original government survey, and had at all times such possession of and exercised such

dominion over the territory as was possible in the case of wild, wet and uncultivated lands. As said by this court in *Worthley* v. *Burbanks,* 146 Ind., 534, 45 N. E., 779, it is manifest that as to adverse possession there can be no absolutely unvarying rule with reference to every kind of real estate. The requirement as to the kind of occupancy of or dominion over land which is necessary to show adverse possession in the case of a cultivated farm, a town lot, or a residence in a populous city, may be quite inapplicable or even impossible in the case of a piece of desert land, or mining claim, a non-navigable lake, a prairie or a forest. The evidence in this case, as we think, was sufficient to show continuous possession by appellee and its grantors of the lands in controversy. The appeal as to Henry B. Mason has been dismissed on his petition, and the contentions made in the brief filed in his behalf need not, therefore, be considered.

Judgment affirmed.

THE STATE OF INDIANA.

IN THE SUPREME COURT, NOVEMBER TERM, 1895.

On the 24th day of January, 1896, being the 53rd judicial day of said November term, 1895.

15903 HON. LEONARD J. HACKNEY,
Chief Justice.
HON. JAMES H. JORDAN,
Hon. LEANDER J. MONKS,
HON. JAMES MCCABE,
HON. TIMOTHY E. HOWARD,
Judges.

In the case of

Annie R. Kean
vs.
Edward Roby *et al.*

Appeal from the Lake Circuit Court.

Came the parties by their attorneys, and the court being sufficiently advised in the premises, gave the following opinion and judgment, pronounced by HOWARD, J.:

This was an action to quiet title to real estate, brought by the appellee Sophi A. Conklin against the appellant and other defendants made appellees on this appeal. Various answers and cross-complaints were filed by the appellant and by other defendants, and the cause was submitted to the court for trial, resulting in a finding and decree against plaintiff.

A new trial having been granted as of right under the statute, the cause was resubmitted to the court for trial

upon the pleadings in the first trial. There was a special finding of facts on this second trial, with conclusions of law, and a decree against the plaintiff and also against the appellant and others, and in favor of certain of the appellees; and the appellant, as also the plaintiff and others named, were enjoined from setting up or asserting any claims or title to the land in question.

Many alleged errors are assigned by the appellant, most of which are irregular, and could be considered only as reasons for a new trial. Neither party, however, has given special attention to the assignment of errors, both preferring to discuss the controlling facts and the law in relation thereto.

The land in controversy is situated in Lake County, in the extreme northwest corner of the state. It is described in the complaint as: "Lot number 5 in section 36, T. 38 N.; lots 8, 9 and 10 in section 1, T. 37 N., and lots 5, 6, 7 and 8 in section 12, T. 27 N., all in range 10 W., Lake County, Indiana, and containing 252.5 acres more or less."

The appellant in her cross-complaint made claim to the same land, "in plaintiff's complaint described," and asked that her title thereto be quieted as against the plaintiff and all of her co-defendants; and that they be enjoined from setting up any claim thereto.

The appellees, who are in possession of the lands in controversy, claim title under the original government survey, by virtue of patents from the United States to the State of Indiana, and from the state to their remote grantors.

Townships 38 and 37 north, range ten west, in which the lands are situated, were originally surveyed in 1834,

under authority of the United States Land Department, as shown by the field notes and plats made a part of the record. These townships are both fractional, lying next to the state line dividing Indiana from Illinois, and are in part covered by a body of water known as Wolf Lake.

The appellees claim that title to all of these lands passed from the general government to the State of Indiana by the swamp land act of September 28, 1850, subject only to identification and selection by the state and approval thereof by the Secretary of the Interior. The patent from the United States to the state is dated March 24, 1853. In this patent it is recited that "The United States of America, in consideration of the premises and in conformity with the Act of Congress aforesaid, have given and granted, and by these presents do give and grant unto the said State of Indiana, in fee simple, subject to the disposal of the legislature thereof, the tracts of land above described." The tracts so described include: "The whole of fractional sections one, twelve, * * * all in township thirty-seven north, of range ten west, * * * also the whole of fractional section thirty-six, in township thirty-eight north, of range ten west." The court found the title thus traced by appellees to be good, and held that they were entitled to continue in possession of the lands in dispute.

The appellant contends that the bed of Wolf Lake, covering a part of the above described sections as aforesaid, was not surveyed in the original survey of 1834, and shows that on representations to that effect, made to the Land Department of the United States, the commissioner of the general land office ordered a re-survey of the land within the meander lines of the lake, which re-survey was

made in 1875. Appellant then claims that on such re-survey by the Land Department the lots in the lake bed became subject to entry and sale, and subject also to the right of appellant's remote grantors to locate "Sioux half-breed scrip" thereon; and she traces her title from patents issued for said lots to such remote grantors on such location of half-breed scrip.

Appellees, on the other hand, contend that all said fractional sections, including the bed of the lake, were surveyed in 1834, and the lands and lots sold by the United States under such survey, so that, rightfully, the government had no such land to survey or sell when the order for the survey of 1875 was made and the lands in question attempted to be re-sold by the Land Department.

As the appellant must succeed, if at all, on the strength of her own title, it will be sufficient to decide the contention here made. If the lands in controversy were, in fact, surveyed in 1834, and sold by the United States under such survey, then it is clear enough that the government had no authority or power to re-survey the lands in 1875, or to sell them over again, and appellant's title must wholly fail.

The annexed plats show the original survey in 1834 of section thirty-six in township 38, and of sections one and twelve in township thirty-seven; and also the re-survey in 1875 of that part of the bed of Wolf Lake, in the same townships and sections, being all that is necessary to indicate the location of the lands in dispute:

We are of opinion that in the original survey of 1834 both townships in question and all of the sections were fully surveyed, including the bed of Wolf Lake.

The plat, with the chains marked thereon, show that

the townships were both fractional. Township 38 consists only of fractional section 36, lying between the Illinois line and Lake Michigan. Township 37 is less than a mile in width, extending from the east township line west to the state line. The field notes show that the east section line, and also the west line, being the state line, were actually run; and that the section corners on said east section line of sections one and twelve were marked. The field notes also show that the east and west line between townships 38 and 37, being the north line of section 1, T. 37, was actually run, except a short distance in the northeast corner, which extends into Lake Michigan; also that the east and west section line between sections 1 and 12, T. 37, was run; also that the east and west section line on the south side of section 12, T. 37, was run from the southeast corner of said section west to the lake, **this line not being extended in the field across to the state line, or west line of the section.** The field notes further show, as does the plat, that all the interior lines of section 36, in T. 38, and the greater part of those in sections 1 and 12, in T. 37, were actually run and the corners marked in the field.

Under provisions of sections 2395 and 2396, R. S. U. S., the foregoing was a sufficient survey of the townships and sections named. By section 2395 R. U., *supra,* it is made a sufficient survey to run "each way, parallel lines at the end of every two miles, and by taking a corner on each of such lines at the end of every mile." In the foregoing survey the east and west section lines, as actually run (are less than a mile apart. All the lines, interior and exterior, of section 36, T. 38, are actually run). So also are all the lines, interior and exterior, of section 1, T. 37. For section 12, T. 37, the north line is actually run.

There remains only the south line of said section 12, a part only of which is run. For this defect, if it should be considered such, section 2396, U. S. R. S., *supra*, provides as follows:

"The boundary lines which have not been actually run and marked shall be ascertained by running straight lines from the established corners to the opposite corresponding corners; **but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water course, Indian boundary line, or other external boundary of such fractional township."** Following this direction, the south line of section 12 will be found by "running from the established corner," at the southeast corner of said section, a "due east and west line, west to the state line, being the west external boundary of such fractional township." [This is the error complained of. W. P. F.]

It appears, therefore, that township 37, as well as township 38, was fully surveyed in the original survey of 1834; that the lines of the survey extend over both land and water, and that the United States conveyed to the state the fractional townships so surveyed.

It follows that all the territory in question in the two townships, including that covered by Wolf Lake, as well as the comparatively dry land on its borders, having passed to the state from the ownership of the United States by the Swamp Land Act of 1850, and the patents

issued to the state therefor in 1853, no land in said sections remained, whether under Wolf Lake or elsewhere, which could be re-surveyed or re-sold by the general government. The survey of 1875 and the sales thereunder were nullities. Appellant, therefore, has no title to the lands claimed by her. See *Tolleston Club* v. *State,* 141 Ind., 197, where a similar question is considered and a like decision reached.

Two objections made to this conclusion may be noticed:

First, it is said that the validity of the re-survey of 1875 having been affirmed by the United States Land Department, which department had full jurisdiction of the matter, the question is not reviewable in the courts. It is true, as said in *Hardin* v. *Jordan,* 140 U. S., 371, that the decisions of the Land Department on matters of fact within its jurisdiction, made in the course of administration, cannot be called in question collaterally.

But, as said in the same case by the Supreme Court of the United States: "If the lands patented were not at the time public property, having been previously disposed of * * * the department had no jurisdiction to transfer the lands, and their attempted conveyance by patent is inoperative and void." See also *Mitchell* v. *Smale,* 140 U. S., 406.

The other objection made is, that in the Beaver Lake case, the *State* v. *Portsmouth Savings Bank,* 106 Ind., 435, this court decided that the sale of the border lots on Beaver Lake, under the original government survey, did not carry title to the lands covered by the waters of the lake. The case is not in point for the very good reason that in the Beaver Lake case the lands under the lake were

not surveyed; the survey ceased at the borders of the lake. In the case of Wolf Lake, however, as we have seen, the lake itself was included in the survey; the section lines passed over and included the waters as well as the land. Had Beaver Lake been actually surveyed, as Wolf Lake was, the matter would be different; as it is that case is not in point. The case at bar is ruled by the Tolleston Club case, *supra.*

The judgment is affirmed.

THE STATE OF INDIANA,
SUPREME COURT.

I, Alexander Hess, clerk of the Supreme Court of the State of Indiana, certify the above and foregoing to be a true and complete copy of the opinion of said court in the above entitled cause.

In witness whereof I hereto set my hand and affix the seal of said court, at the city of Indianapolis, this 29th day of January, 1896.

[SEAL.] (Signed) ALEX. HESS, *C. S. C.*

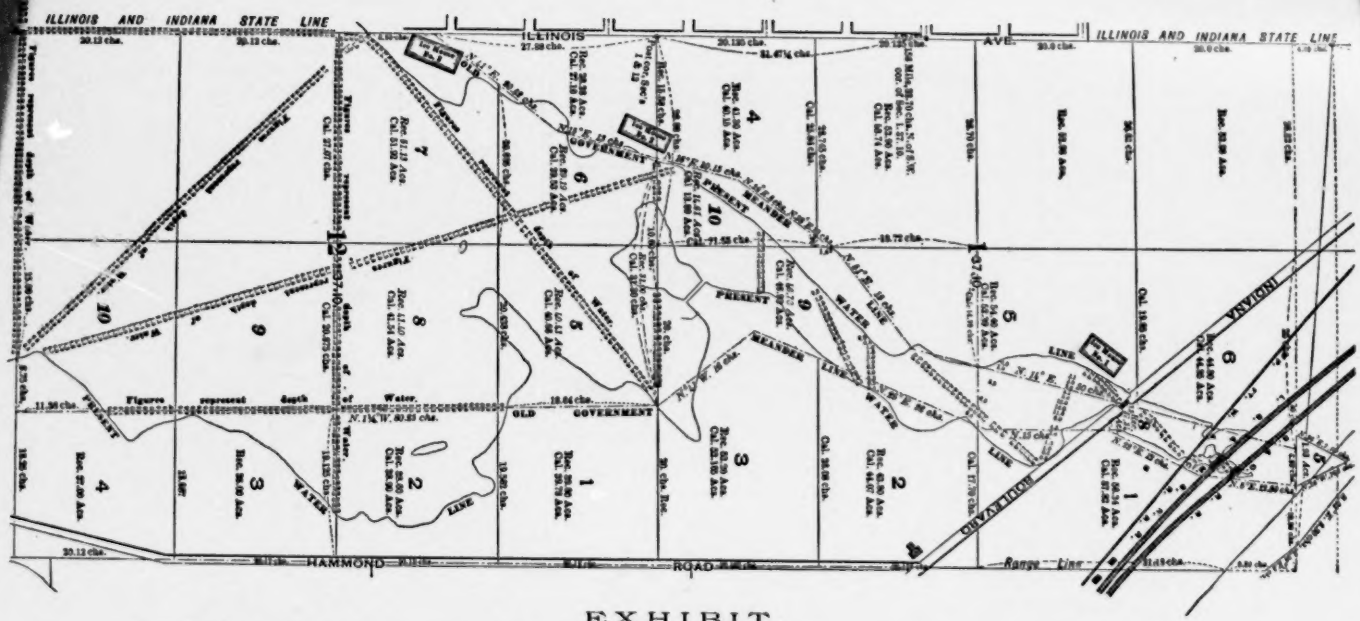


EXHIBIT.

Plat showing Survey of Sections 36, T. 38, R. 10, and Sections 1 and 12, T. 37, R. 10, in Lake County, Indiana,

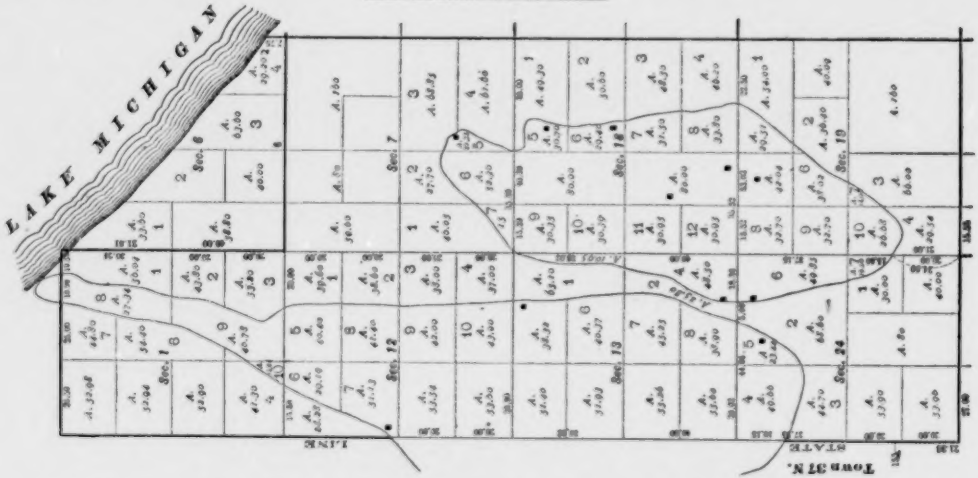
—AND INVIRONS—

BY HIRSCH & VANDERLIP, IN AUGUST AND SEPTEMBER, 1889.

See Record page.....

"TOWNSHIP No. 37 N., RANGE No. 10 W., 2nd MERIDIAN, INDIANA."

"The survey of the Lakes, comprised with in pink shaded lines, was appealed from the Commissioner's approval to the Secretary of the Interior, April 20, 1876, and the approval of the survey was affirmed by the Secretary, February 23rd, 1897." See Record page.....



"The above map of Township No. 37 North, of Range No. 10 West, of the Second Meridian, Indiana, is strictly conformable to the field notes of the survey, thereof on file in this office, which have been examined and opproved."

"J. S. BURDETT,"

"Comr. & Ex-Officio Surv. Gen'l of Indiana."

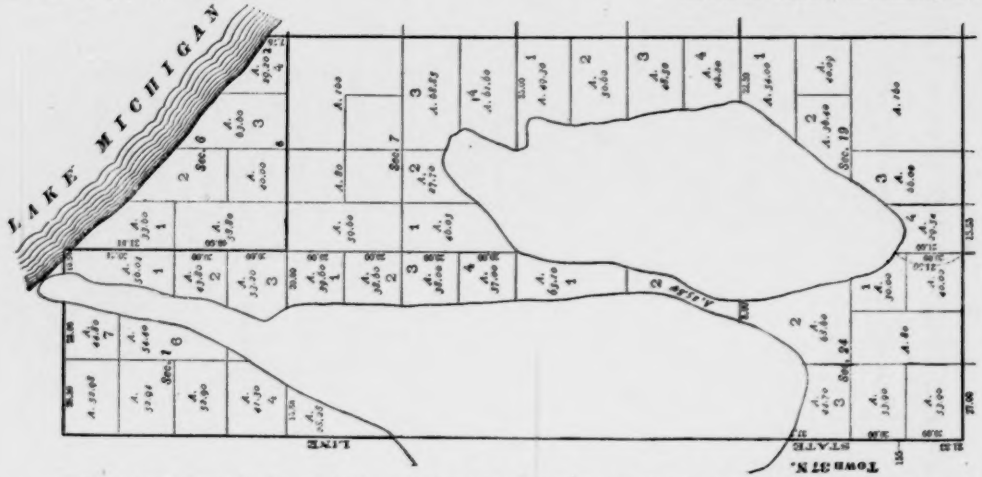
EXHIBIT.

See Record page.....

"Department of the Interior General Land Office, Washington, October 3rd, 1889."

"This plat of Township No. 39 North, of Range No. 10 West, Second Meridian, is a true copy of the official plat thereof."

"LEWIS A. GROFF, *Commissioner.*"



"The above map of Township No. 37 North, of Range No. 10 West, of the 2nd Meridian, Indiana, is strictly conformable to the field notes of the survey thereof on file in this office, which have been examined and approved."

Surveyor Generals Office, Cincinnati, O. April 26th, 1836.

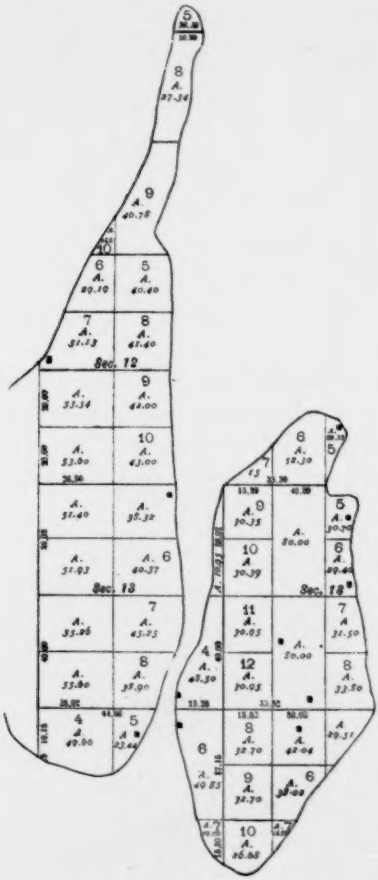
ROBT. T. LYTLE, *Sur. Gen'l,*

by SAMUEL WILLIAMS, *Ch. Cl'k.*

ROBT. S. LYTLE, S. G.

...BEDS...
OF
WOLF AND GEORGE LAKES.

Surveyed by Wolcott.



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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 8.

OCTOBER TERM, A. D. 1902.

ANNA R. KEAN et al., *Plaintiffs in Error,*

vs.

THE CALUMET CANAL and IMPROVEMENT CO., *Defendant in Error.*

In Error to the Supreme Court of Indiana.

PETITION FOR REHEARING.

WILLIAM P. FENNELL,
COUNSEL FOR PLAINTIFFS IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States.

No. 8.

OCTOBER TERM, A. D. 1902.

ANNA R. KEAN ET AL., *Plaintiffs in Error,* *vs.* THE CALUMET CANAL AND IMPROVEMENT CO., *Defendant in Error.*	In Error to the Supreme Court of Indiana.

PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

Now, again come plaintiffs in error, Anna R. Kean *et al.*, by William P. Fennell, counsel, and petition the court that a rehearing be granted in the above entitled case and as reasons, therefor say:

The court has failed to note the clear distinction between a state decision, based exclusively on the local law and one based in part, at least, on the Federal law.

1. The local law of Indiana, as stated in *Kean* v. *Robey,* is that:

2. If the bed of Wolf lake was not surveyed in 1834. it did not pass to the owners of the abutting lot owners.

Kean v. *Robey,* 145 Ind., 221.

State v. *Portsmouth Savings Bank,* 106 Ind., 459.

If it was surveyed it did pass.

Tolleston Club v. *State*, 141 Ind., 197.

3. But the question as to whether, or not, Wolf lake was surveyed in 1834, is to be decided by the Federal law. No court has ever held otherwise.

4. That question of survey being settled by the Federal law in the negative—as it must be—there being no established *corners* to which the lines could be extended,

5. Then the application of the local law to the facts thus established is in our favor.

Kean v. *Robey, supra.*

State v. *Portsmouth Savings Bank, supra.*

It was not necessary for my success to combat the theory upon which *Hardin* v. *Jordan* rested, viz.: that the question of *riparian rights* was to be determined by the local law, because *on that question* both the local law and the Federal law are identical, at least, in reference to *unsurveyed* lake beds.

Kean v. *Robey*, 145 Ind., 221.

State v. *Portsmouth Savings Bank*, 106 Ind., 459.

Gassam v. *Phillips*, 20 How., 372.

Niles v. *Cedar Point Club*, 175 U. S., 300.

By the Federal law the bed of Wolf lake was not surveyed in 1834,

Gassam v. *Phillips*, 20 How., 372.

Niles v. *Cedar Point Club*, 175 U. S., 300.

Shively v. *Bowcby*, 152 U. S., 10.

If not, then by both Federal and local law it did not pass to the owners of abutting lots. Cases above cited.

Defendants in error being plaintiffs below must recover upon the strength of their own title. So it does matter whether the lake bed was surveyed or not. And for the further reasons so cojently stated in the dissenting opinion.

I hereby certify that I verily believe that the reasons above given for a rehearing are sound in law and equity, and further, that they are not in conflict with the decision of this court in *Hardin* v. *Jordan*.

WILLIAM P. FENNELL,
Counsel for Plaintiffs in Error.

No. 260. A.

(Br. of Johnson & Hamilton for D. & C. (on mo.)

FILED
APR 8 1901
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

Filed April 8, 1901.

No. 260.

ANNA R. KEAN,
Plaintiff in Error,

vs.

THE CALUMET CANAL AND IMPROVEMENT COMPANY,
Defendant in Error.

STATEMENT BY DEFENDANT IN ERROR IN OPPOSITION TO MOTION FOR CONTINUANCE.

WILLIAM O. JOHNSON,
WILLIAM JOHNSTON,
SOLICITORS FOR DEFENDANT IN ERROR.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

No. 260.

ANNA R. KEAN,
Plaintiff in Error,

vs.

THE CALUMET CANAL AND IMPROVEMENT COMPANY,
Defendant in Error.

STATEMENT BY DEFENDANT IN ERROR IN OPPOSITION TO MOTION FOR CONTINUANCE.

MAY IT PLEASE THE COURT:

Now comes The Calumet Canal and Improvement Company, defendant in error, by William O. Johnson and William Johnston, its solicitors, and objects to the granting of the motion of plaintiff in error for a continuance of the above entitled cause, and as the reasons for its said objection the said defendant in error respectfully submits the following:

1. The suit is a controversy concerning the title to certain lands conveyed to the State of Indiana by the United States under the swamp land act of 1850; said

lands being located in Lake County, Indiana, adjoining the state line and contiguous to the City of Chicago. Said land is very valuable, and the action of plaintiff in error creates such a cloud upon the title that the defendant cannot sell and dispose of the land during the pendency of this appeal.

2. Great delay has already been occasioned by the plaintiff in error in this case, and the defendant in error has, by reason of the pendency of this suit, been hindered and delayed in the sale and disposition of this land for more than six years.

3. This action was commenced in the Circuit Court of Lake County, Indiana, on January 16, 1895. Afterwards, the plaintiff in error took a change of venue to the Circuit Court of Porter County, Indiana, wherein the said cause was prosecuted to a final determination and a decree therein rendered in favor of the defendant in error on November 5, 1895. Afterwards, plaintiff in error prosecuted an appeal to the Supreme Court of the State of Indiana, wherein the decree of the lower court was affirmed by the opinion of the Supreme Court of Indiana rendered on the twenty-sixth day of April, 1898, which said opinion is reported in Volume 150 of the Reports of the Supreme Court of Indiana, at page 699 thereof, the cause being there entitled "*Mason et al. versus The Calumet Canal and Improvement Company*," a true copy of which said opinion is hereto attached in the form of an appendix for the convenience of this Honorable Court.

4. Defendant in error says that there has already been unreasonable delay in prosecuting this appeal; that said appeal is causing it great and irreparable damage, and that it believes and so asserts that there is absolutely no merit in the claim of the said plaintiff in error.

5. There is not, in the motion of the said plaintiff in error for a continuance, sufficient reason assigned.

6. There is no assurance that the plaintiff in error will ever be able and willing to comply with the rules of this court in the matter of the printing of the record herein. Said motion for a continuance is based upon no rule of this court and no principle of law, and the defendant in error therefore insists that the said motion of the plaintiff in error for a continuance be denied.

Very respectfully submitted.

THE CALUMET CANAL AND IMPROVEMENT COMPANY,
Defendant in Error,
By WILLIAM O. JOHNSON,
WILLIAM JOHNSTON,
Solicitors for Defendant in Error.

E. Hamilton
of Counsel

APPENDIX.

(*Mason et al.* v. *Calumet Canal & Improvement Co.*—Supreme Court of Indiana, April 26, 1898.)

Opinion.

Howard, C. J.: This was an action brought by appellee against appellants and others, to quiet title to certain real estate described in the complaint, and situated in S. ½ section 18, and section 19, township 37 N., range 9 W.; and in sections 12, 13, and 24, township 37 N., range 10 W., in Lake County. The lands in controversy, together with other lands, were conveyed to the State of Indiana by the United States, under the swamp land act of 1850, and by the description of the government survey of 1834. By the same descriptions, the lands were conveyed by the state to the remote grantors of appellee. Part of the lands are included in what was once the bed of Wolf Lake and the bed of Lake George; but, since the survey, the waters have, in large measure, receded, leaving the lake beds comparatively dry land. In 1875, certain persons, under the assumption that the beds of the lakes had not been surveyed in 1834, procured a resurvey of that part of the lands formerly covered by the waters; and it is through this last survey, and the sales made in pursuance thereof, that appellants claim title. The case before us, therefore, in so far as concerns source of title, does not differ from that of *Kean* v.

Roby, 145 Ind., 221, 42 N. E., 1011. On the authority of the decision in that case, there can be no question that the resurvey of 1875, as also the sales made thereunder, was wholly invalid, and, consequently, that appellee's title, as based upon the original survey of 1834, and the sales made under that survey, is good. No real distinction in this regard has been shown between the two cases.

The second contention is that the action is barred by the fifteen and the twenty years' statute of limitations. This contention is plainly founded upon the same theory as the first, namely, that the appellants obtained some title or took possession of some kind under the void survey of 1875. As to title, as we have seen, there was none. As to possession, the court heard the evidence, and did not find, nor can we perceive, that the continuous and lawful possession of appellee and its immediate and remote grantors was ever broken by the unauthorized entrance, if any there was, on the part of appellants, or any of them. Appellee and its grantors continued to pay the taxes assessed on the lands, by the descriptions in their deeds coming down from the original government survey, and had at all times such possession of and exercised such dominion over the territory as was possible in the case of wild, wet and uncultivated lands. As said by this court in *Worthley* v. *Burbanks*, 146 Ind., 534, 45 N. E. 779, it is manifest that as to adverse possession there can be no absolutely unvarying rule with reference to every kind of real estate. The requirement as to the kind of occupancy of or dominion over land which is necessary to show adverse possession in the case of a cultivated farm, a town lot, or a residence in a populous city, may be quite inapplicable or even impossible in the case of a piece of desert land, a mining claim, a non-navigable

lake, a prairie, or a forest. The evidence in this case, as we think, was sufficient to show continuous possession by appellee and its grantors of the lands in controversy. The appeal as to Henry B. Mason has been dismissed on his petition, and the contentions made in the brief filed in his behalf need not therefore be considered. Judgment affirmed.

FILED
OCT 19 1901
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

Filed Oct. 19, 1901.

No. 47.

ANNA R. KEAN ET AL., PLAINTIFFS IN ERROR,

vs.

THE CALUMET CANAL AND IMPROVEMENT COMPANY, DEFENDANT IN ERROR.

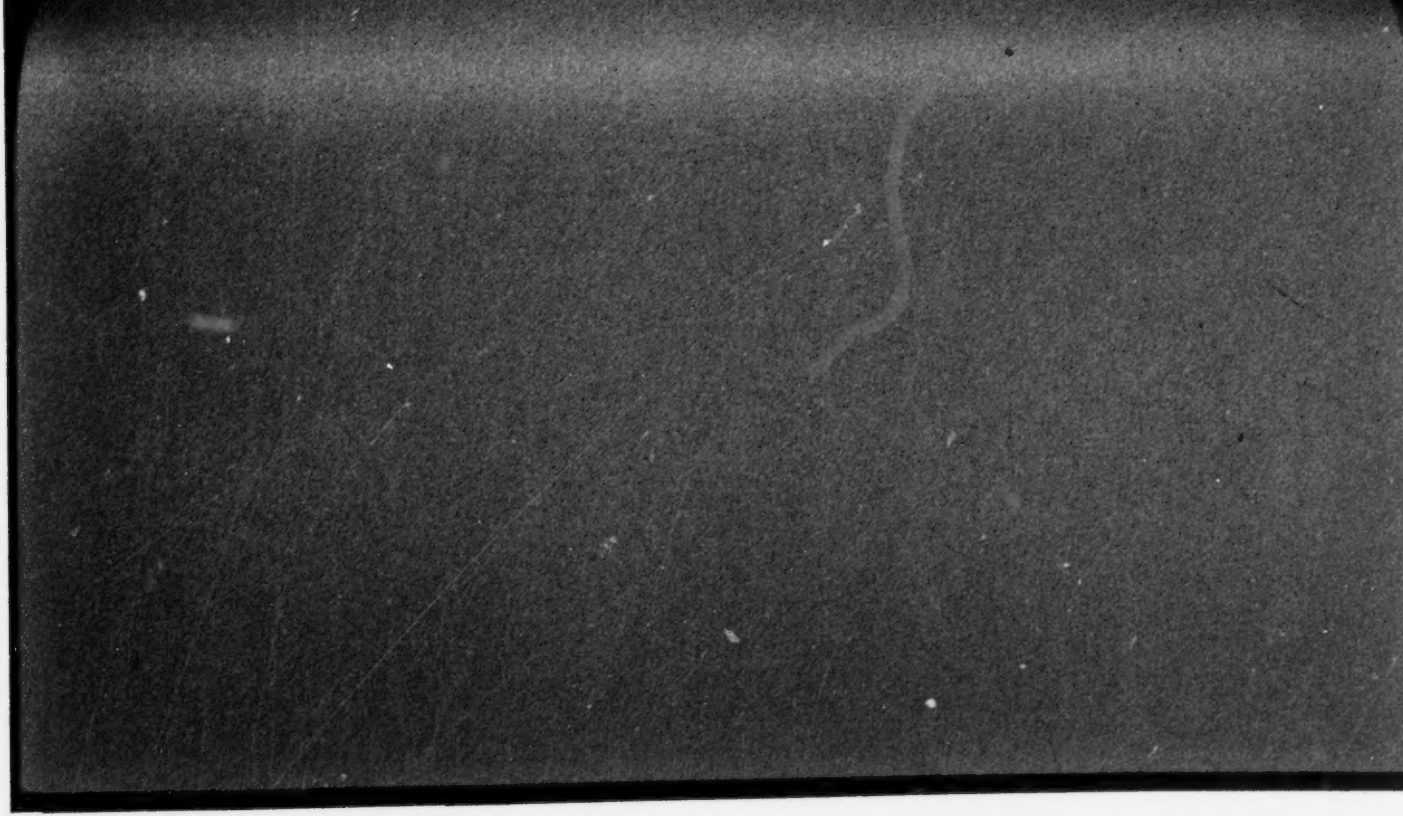
ERROR TO THE SUPREME COURT OF INDIANA.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

FREDERICK S. WINSTON,
JAMES F. MEAGHER,
SILAS H. STRAWN,
Attorneys for Defendant in Error.

G. E. HAMILTON, *Of Counsel.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 900



Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 47.

ANNA R. KEAN ET AL., PLAINTIFFS IN ERROR,

vs.

THE CALUMET CANAL AND IMPROVEMENT COMPANY, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF INDIANA.

Brief and Argument for Defendant in Error.

STATEMENT.

MAY IT PLEASE THE COURT:

This action was brought by the defendant in error under section 1070, Horner's Annotated Statutes of Indiana, which is as follows:

"An action may be brought by any person, either in or out of possession, or by one having an interest in remainder or reversion, against another who claims title to, or interest in, real property adverse to him, although the defendant may not be in possession thereof, for the purpose of determining and quieting the question of title."

There is included in the complaint a large number of acres of land owned by the defendant in error, the title to which is in no way involved in this controversy and in which the plaintiffs in error disclaim any interest whatever.

The questions presented in this court are so concisely stated in the opinion rendered by the supreme court of Indiana in the case (150 Indiana, 699) that we will adopt that opinion as our statement here. It is as follows:

"This was an action brought by appellee against appellants and others to quiet title to certain real estate described in the complaint, and situated in S. ½ section 18, and section 19, township 37 N., range 9 W.; and in sections 12, 13 and 24, township 37 N., range 10 W., in Lake county. The lands in controversy, together with other lands, were conveyed to the State of Indiana by the United States under the swamp-land act of 1850, and by the descriptions of the Government survey of 1834. By the same descriptions the lands were conveyed by the State to the remote grantors of appellee. Part of the lands are included in what was once the bed of Wolf lake and the bed of Lake George, but since the survey the waters have, in large measure, receded, leaving the lake beds comparatively dry land.

"In 1875 certain persons, under the assumption that the beds of the lakes had not been surveyed in 1834, procured a resurvey of that part of the lands formerly covered by the waters, and it is through this last survey and the sales made in pursuance thereof that appellants claim title.

"The case before us, therefore, in so far as concerns source of title, does not differ from that of *Kean vs. Roby*, 145 Ind., 221; 42 N. E., 1011. On the authority of the decision in that case, there can be no question that the resurvey of 1875, as also the sales made thereunder, was wholly invalid, and consequently that appellee's title as based upon the original survey of 1834, and the sales made under that survey, is good. No real distinction in this regard has been shown between the two cases.

"The second contention is that the action is barred by the fifteen and twenty years' statute of limitations. This contention is plainly founded upon the same theory as the first, namely, that the appellants obtained some title or took possession of some kind under the void survey of 1875. As to

title as we have seen there was none. As to possession, the court heard the evidence and did not find, nor can we perceive, that the continuous and lawful possession of appellee and its immediate and remote grantors was ever broken by the unauthorized entrance, if any there was on the part of appellants, or any of them. Appellee and its grantors continued to pay the taxes assessed on the lands, by the descriptions in their deeds coming down from the original Government survey, and had at all times such possession of and exercised such dominion over the territory as was possible in the case of wild, wet and uncultivated lands. As said by this court in *Worthley vs. Burbanks*, 146 Ind., 534, 45 N. E., 779, it is manifest that as to adverse possession there can be no absolutely unvarying rule with reference to every kind of real estate. The requirement as to the kind of occupancy of or dominion over land which is necessary to show adverse possession in the case of a cultivated farm, a town lot, or a residence in a populous city, may be quite inapplicable or even impossible in the case of a piece of desert land, or mining claim, a non-navigable lake, a prairie or a forest. The evidence in this case, as we think, was sufficient to show continuous possession by appellee and its grantors of the lands in controversy."

The opinion of the supreme court of Indiana in the case of Kean *vs.* Roby, above referred to and reported in 145 Indiana, 221, is as follows:

"This was an action to quiet title to real estate, brought by the appellee Sophia Conklin against the appellant and other defendants made appellees on this appeal. Various answers and cross-complaints were filed by the appellant and by other defendants, and the cause was submitted to the court for trial, resulting in a finding and decree against plaintiff.

"A new trial having been granted as of right under the statute, the cause was resubmitted to the court for trial upon the pleadings in the first trial. There was a special finding of facts on this second trial, with conclusions of law, and a decree against the plaintiff and also against the appellant and others, and in favor of certain of the appellees; and the appellant, as also the plaintiff and others named,

were enjoined from setting up or asserting any claims or title to the land in question.

"Many alleged errors are assigned by the appellant, most of which are irregular, and could be considered only as reasons for a new trial. Neither party, however, has given special attention to the assignment of errors, both preferring to discuss the controlling facts and the law in relation thereto.

"The land in controversy is situated in Lake county, in the extreme northwest corner of the State. It is described in the complaint as: 'Lot number 5 in section 36, T. 38 N.; lots 8, 9 and 10 in section 1, T. 37 N., and lots 5, 6, 7 and 8 in section 12, T. 37 N., all in range 10 W., Lake county, Indiana, and containing 252.5 acres more or less.'

"The appellant in her cross-complaint made claim to the same land, 'in plaintiff's complaint described,' and asked that her title thereto be quieted as against the plaintiff and all of her codefendants; and that they be enjoined from setting up any claim thereto.

"The appellees, who are in possession of the lands in controversy, claim title under the original Government survey, by virtue of patents from the United States to the State of Indiana, and from the State to their remote grantors.

"Townships 38 and 37 north, range 10 west, in which the lands are situated, were originally surveyed in 1834, under authority of the United States Land Department, as shown by the field-notes and plats made a part of the record. These townships are both fractional, lying next to the State line dividing Indiana from Illinois, and are in part covered by a body of water known as Wolf lake.

"The appellees claim that title to all of these lands passed from the General Government to the State of Indiana by the swamp-land act of September 28, 1850, subject only to identification and selection by the State and approval thereof by the Secretary of the Interior. The patent from the United States to the State is dated March 24, 1853. In this patent it is recited that 'the United States of America, in consideration of the premises and in conformity with the act of Congress aforesaid, have given and granted, and by these presents do give and grant unto the said State of Indiana, in fee-simple, subject to the disposal of the legislature thereof, the tracts of land above described.' The tracts so described

include: 'The whole of fractional sections one, twelve, * * * all in township thirty-seven north, of range ten west, * * * also the whole of fractional section thirty-six, in township thirty-eight north, of range ten west.' The court found the title thus traced by appellees to be good, and held that they were entitled to continue in possession of the lands in dispute.

"The appellant contends that the bed of Wolf lake, covering a part of the above-described sections, as aforesaid, was not surveyed in the original survey of 1834, and shows that on representations to that effect, made to the Land Department of the United States, the Commissioner of the General Land Office ordered a resurvey of the land within the meander lines of the lake, which resurvey was made in 1875. Appellant then claims that on such resurvey by the Land Department the lots in the lake bed became subject to entry and sale, and subject also to the right of appellant's remote grantors to locate 'Sioux half-breed scrip' thereon; and she traces her title from patents issued for said lots to such remote grantors on such location of half-breed scrip.

"Appellees, on the other hand, contend that all said fractional sections, including the bed of the lake, were surveyed in 1834, and the lands and lots sold by the United States under such survey, so that, rightfully, the Government had no such land to survey or sell when the order for the survey of 1875 was made and the lands in question attempted to be resold by the Land Department.

"As the appellant must succeed, if at all, on the strength of her own title, it will be sufficient to decide the contention here made. If the lands in controversy were, in fact, surveyed in 1834, and sold by the United States under such survey, then it is clear enough that the Government had no authority or power to resurvey the lands in 1875, or to sell them over again, and appellant's title must wholly fail.

"The annexed plats show the original survey in 1834 of section thirty-six in township 38, and of sections one and twelve in township thirty-seven; and also the resurvey in 1875 of that part of the bed of Wolf lake, in the same townships and sections, being all that is necessary to indicate the location of the lands in dispute:

"We are of opinion that in the original survey of 1834

both townships in question and all of the sections were fully surveyed, including the bed of Wolf lake.

"The plat, with the chains marked thereon, show that the townships were both fractional. Township 38 consists only of fractional section 36, lying between the Illinois line and Lake Michigan. Township 37 is less than a mile in width, extending from the east township line west to the State line. The field-notes show that the east section line, and also the west line, being the State line, were actually run; and that the section corners on said east section line of sections 1 and 12 were marked. The field-notes also show that the east and west line between townships 38 and 37, being the north line of section 1, T. 37, was actually run, except a short distance in the northeast corner, which extends into Lake Michigan; also that the east and west section line between sections 1 and 12, T. 37, was run; also that the east and west section line on the south side of section 12, T. 37, was run from the southeast corner of said section west to the lake, this line not being extended in the field across to the State line, or west line of the section. The field-notes further show, as does the plat, that all the interior lines of section 36, in T. 38, and the greater part of those in sections 1 and 12, in T. 37, were actually run and the corners marked in the field.

"Under provisions of sections 2395 and 2396, U. S. R. S., the foregoing was a sufficient survey of the townships and sections named. By section 2395, R. S., *supra*, it is made a sufficient survey to run 'each way, parallel lines at the end of every two miles and by taking a corner on each of such lines at the end of every mile.' In the foregoing survey the east and west section lines, as actually run (are less than a mile apart. All the lines, interior and exterior, of section 36, T. 38, are actually run). So also are all the lines, interior and exterior, of section 1, T. 37. For section 12, T. 37, the north line is actually run.

"There remains only the south line of said section 12, a part only of which is run. For this defect, if it should be considered such, section 2396, U. S. R. S., *supra*, provides as follows:

"'The boundary lines which have not been actually run and marked shall be ascertained by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships

where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water-course, Indian boundary line, or other external boundary of such fractional township.' Following this direction, the south line of section 12 will be found by 'running from the established corner,' at the southeast corner of said section, a 'due east and west line, west to the State line, being the west external boundary of such fractional township.'

"It appears, therefore, that township 37, as well as township 38, was fully surveyed in the original survey of 1834; that the lines of the survey extend over both land and water, and that the United States conveyed to the State the fractional townships so surveyed.

"It follows that all the territory in question in the two townships, including that covered by Wolf lake, as well as the comparatively dry land on its borders, having passed to the State from the ownership of the United States by the swamp-land act of 1850, and the patents issued to the State therefor in 1853, no land in said sections remained, whether under Wolf lake or elsewhere, which could be resurveyed or resold by the General Government. The survey of 1875 and the sales thereunder were nullities. Appellant, therefore, has no title to the lands claimed by her. See *Tolleston Club vs. State*, 141 Ind., 197, where a similar question is considered and a like decision reached.

"Two objections made to this conclusion may be noticed:

"First, it is said that the validity of the resurvey of 1875 having been affirmed by the United States Land Department, which Department had full jurisdiction of the matter, the question is not reviewable in the courts. It is true, as said in *Hardin vs. Jordan*, 140 U. S., 371, that the decisions of the Land Department on matters of fact within its jurisdiction made in the course of administration, cannot be called in question collaterally.

"But, as said in the same case by the Supreme Court of the United States: 'If the lands patented were not at the time public property, *having been previously disposed of* * * * the Department had no jurisdiction to transfer the lands, and their attempted conveyance by patent is inoperative and void. See also *Mitchell vs. Smale*, 140 U. S., 406.

"The other objection made is, that in the Beaver Lake

case, the *State vs. Portsmouth Savings Bank*, 106 Ind., 435, this court decided that the sale of the border lots on Beaver lake, under the original Government survey, did not carry title to the lands covered by the waters of the lake. The case is not in point for the very good reason that in the Beaver Lake case the lands under the lake were not surveyed; the survey ceased at the borders of the lake. In the case of Wolf lake, however, as we have seen, the lake itself was included in the survey; the section lines passed over and included the waters as well as the land. Had Beaver lake been actually surveyed, as Wolf lake was, the matter would be different; as it is that case is not in point. The case at bar is ruled by the Tolleston Club case, *supra*."

So far as the title to the property in which the plaintiffs in error claim an interest is concerned, it was unnecessary for the defendant in error to have commenced this or any other action, for, we respectfully submit, this court has, in the cases of *Hardin vs. Jordan* and *Mitchell vs. Smale*, reported in 140 U. S., at pages 371 and 406, respectively, conclusively settled in favor of the defendant in error all questions respecting that title which have been or could be raised by plaintiffs in error. Inasmuch, however, as counsel for plaintiffs in error has in his brief filed herein attempted to re-argue practically the same questions decided in the *Hardin* and *Mitchell* cases, we will first attempt to show that there is in this record no new question for this court to pass upon.

BRIEF.

Plaintiffs in error claim, *first*, that their title to the lands above described in the beds of Wolf lake and Lake George, claimed to have been acquired by them under the resurvey of said lands in 1875, is superior to the title of defendant in error, based upon the original survey of 1834; and, *second*, that this action of defendant in error is barred by the statute of limitations.

I.

HARDIN *vs.* JORDAN AND MITCHELL *vs.* SMALE CONTROL THIS CASE.

Both of these cases involved the title to land on the margin of and under the waters of Wolf lake, the same as in the case at bar. They differ from the case at bar only in that the land there in controversy was within the boundaries of the State of Illinois and just across the line from the land now in question, in the State of Indiana. The only distinction, therefore, between these cases and the case at bar is the difference between the laws of the States of Illinois and Indiana respecting the rights of parties owning land bordering on inland lakes.

In passing upon the questions raised by the plaintiffs in error it may be helpful to the court if we here print somewhat at length from the opinions in the *Hardin* and *Mitchell* cases.

In Hardin *vs.* Jordan, at page 379 of the opinion, the court said:

"We are called upon to decide whether the title of the plaintiff, under the patent granted to her ancestor in 1841, extended beyond the limits of the actual survey, under the permanent waters of the lake in front of the land described in the patent, and not merely to the line of low-water mark,

as held by the court below. It will be observed that the Government surveys made in 1834–'5 upon which the patent was issued, not only laid down a meander line next to the lake, but also described said lines as running 'along the margin of the lake;' and the plat of the survey, returned to the general and local land offices, and referred to in the patent for identification of the land granted, exhibited the granted tracts as actually bordering upon the lake; and the lake itself on said plat was marked with the words 'navigable lake,' although the fact found by the court is that the lake was not and is not a navigable lake, but a non-navigable fresh-water lake or pond. The patent itself does not contain all the particulars of the survey, but the grant of the lands is recited to be according to the official plat of the survey of said lands, returned to the General Land Office by the surveyor general, thereby adopting the plat as a part of the instrument.

"Such being the form of the title granted by the United States to the plaintiff's ancestor, the question is as to the effect of that title in reference to the lake and the bed of the lake in front of the lands actually described in the grant. This question must be decided by some rule of law, and no rule of law can be resorted to for the purpose except the local law of the State of Illinois. If the boundary of the land granted had been a fresh-water river, there can be no doubt that the effect of the grant would have been such as is given to such grants by the law of the State, extending either to the margin or center of the stream, according to the rules of that law. It has been the practice of the Government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the Federal and State courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary. (Citing Railroad Co. *vs.* Schurmeir, 7 Wall., 272, and other cases.) Mr. Justice

Clifford in the case first cited says: 'Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field-notes the meander line is represented as the border line of the stream, and shows to a demonstration that the water-course, and not the meander line, as actually run on the land, is the boundary.' It has never been held that the lands under water, in front of such grants, are reserved to the United States, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain, and to derogate from the value of natural boundaries, like streams and bodies of waters. * * *

"In the case of Barney *vs.* Keokuk, 94 U. S., 324, we held that it is for the several States themselves to determine this question, and that if they choose to resign to the riparian proprietor rights which properly belong to them, in their sovereign capacity, it is not for others to raise objections. That was a case which arose in the State of Iowa with regard to land on the banks of the Mississippi, in the city of Keokuk, and it appearing to be the settled law of that State that the title of riparian proprietors on the banks of the Mississippi extends only to ordinary high-water mark, and that the shore between high and low water mark, as well as the bed of the river, belongs to the State, this court accepted the local law as that which was to govern the case. * * *

"We do not think it necessary to discuss this point further. In our judgment the grants of the Government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie. * * *

"The reason for departing from the common law in cases of this kind is well and clearly stated by Judge Gresham in the case of State of Indiana *vs.* Milk, 11 Bissell, 197; 11 Fed. Rep., 389. He there says: 'Non-navigable streams are usually narrow, and the lines of riparian owners can be extended into them at right angles, without interference or

confusion, and without serious injustice to any one. It was therefore natural, when such streams were called for as boundaries, to hold that the real line between opposite shore-owners was the thread of the current. The rights of the riparian proprietors in the bed of the stream, and in the stream itself, were thus clearly defined. But when this rule is attempted to be applied to lakes and ponds practical difficulties are encountered. They have no current, and being more or less circular, it would hardly be possible to run the boundary lines beyond the water's edge, so as to define the rights of shore-owners in the beds. Beaver lake is seven and a half miles east and west, and less than five miles north and south. Extending the side and end lines into the lake, there being no current, when would they meet? This rule is applicable, if at all, whether there be one or more riparian proprietors. I do not think the mere proprietorship of the surrounding lands will, in all cases, give ownership to the beds of natural non-navigable lakes and ponds, regardless of their size. It would be unfair and unjust to allow a party to claim and hold against his grantor the bed of a lake containing thousands of acres, solely on the ground that he had bought and paid for the small surrounding fractional tracts—the mere rim.'

"We do not think that this argument *ab inconvenienti* is sufficient to justify an abandonment of the rules of the common law, which, as we have shown, have been adopted in Illinois as the law of the land. It is too much like judicial legislation. It is as much as to say: 'We think the common law might be improved, and we will, therefore, improve it.' As to the supposed difficulty or inconvenience in applying the law, it is no greater than that which occurs on any bay or incurved shore, even of a large river, in adjusting the outgoing boundary lines between adjoining proprietors over the submerged bottoms of flats lying in front of their riparian lands. Just and equitable rules have been adopted for settling the mutual rights of parties in such cases. Where a lake is very long in comparison with its width, the method applied to rivers and streams would probably be most suitable for adjusting riparian rights in the lake bottom along its sides, and the use of converging lines would only be required at its two ends. But whatever mode of determining

the outgoing lines, as between adjoining owners, should be adopted in special cases, (which may be left for determination when they arise,) there can be no difficulty in the present case as between the plaintiff and the defendant. The latter is not an adjoining owner. The controversy here is between a riparian owner and a party claiming the land under water in front of him; and as between them, we think there is no question as to the riparian owner's right.

"The supreme court of Michigan in a recent case (Clute *vs.* Fisher, 65 Michigan, 48, since followed by Stoner *vs.* Rice, 121 Indiana, 51) held that the riparian owner of a fractional lot bounded by a non-navigable lake only takes so much of the lake bottom as is required to fill out the section or quarter section of which he owns the fraction; in other words, that his common-law right is limited by the sectional lines of the survey. It was conceded, however, that if the lake were so large that the lines of the granted sections would not embrace the whole lake bottom, then the riparian ownership would be extended to the center so as to include the whole bottom. In this case the sectional lines included all that was in dispute, the question being raised upon the cutting of the ice on the surface. In the other case (Stoner *vs.* Rice), the rule so adopted gave to the riparian owner the whole of the lake bottom as against a subsequent grantee of the Government; a result identical with that which would have been produced by the unmodified common-law rule. These decisions, however, are interesting because they are founded on the principle that the Government surveys form a system or network of lands in block, whose sectional and subsectional lines, whether actually surveyed on the land, or projected by the imagination through standing bodies of water, constitute lines of limitation which arrest and restrict any extension of a grant by implication beyond them. This is substantially the principle by which the Roman *agri limitati* were governed. These consisted, generally, of districts or territories acquired by conquest, and assigned and set apart for the benefit of veteran soldiers, when retired from active service in the army. The method of surveying such a territory was to draw lines towards the four quarters of the heavens, parallel and crosswise, in order to effect a uniform division of the lots, and to fix immutable boundaries between them. These boundaries, called *limites*, were marked

by a slip of land left for the purpose untouched by cultivation, as balks or highways. The squares of land contained either thirty-three or a hundred and thirty-three acres; that is, they were either ten or twenty *actus* square. Lands thus surveyed and appropriated were called limited lands—*agri limitati*—and when they bordered on streams or other waters they were not entitled, as other riparian lands were, to any accretion or alluvion, or to islands in the stream, but were strictly confined to the lines by which they were actually or theoretically limited. (See Dig. Lib. 41, tit. 1, frs. 7, 16; Lib. 43, tit. 12, fr. 1, sec. 6, 7; Gronovius, in note to Grotius, De Jure Bel. ac Pac., Lib. 2, cap. 3, sec. 16; Niebuhr's Hist. of Rome, vol. 2, App. 1.)

"This method of disposing of the subject might be convenient and attended with some advantages if it were sanctioned by the law; but we do not see any greater reason for adopting this departure from the common law than that followed in the case of State of Indiana *vs.* Milk, before referred to. * * *

"A question is made with regard to the effect of the proceedings which took place before the register and receiver of the local land office, and, by appeal, before the Commissioner of the General Land Office and the Secretary of the Interior, in relation to the right of the Government to survey and grant the lands under Wolf lake in 1874. Both Hardin and De Witt were notified of said proceedings and appeared and contested the same; but the decision was against them and in favor of the Government. It is contended that by this decision the question became *res judicata*, and that Hardin and De Witt and those claiming under them are bound thereby. It is very true that the decisions of the Land Department on matters of fact within its jurisdiction, made in due course of administration, cannot be called in question collaterally. But, as was declared in the recent case of Davis *vs.* Weibbold, 139 U. S., 507, decided at the present term of this court, 'if the lands patented were not at the time public property, having been previously disposed of, or no provision had been made for their sale or other disposition, or they had been reserved from sale, the Department had no jurisdiction to transfer the lands, and their attempted conveyance by patent is inoperative and void.' So that, if the lands had been 'previously disposed of,' the Department has no juris-

diction over them; and the question whether they have, or have not, been previously disposed of is a judicial question, and not determinable by the Executive Department, except for the purpose of governing its own conduct in the administration of its functions. The same principle is involved in Moore *vs.* Robbins, 96 U. S., 530, 533, 534, where it is said by Mr. Justice Miller, speaking for the court: 'With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel or annul the instrument which he has made and delivered. If fraud, mistake, error or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the Government is the party injured, this is the proper course.' Again, referring to the power of the Secretary of the Interior after patent, it is said: 'He is absolutely without authority. If this were not so, the titles derived from the United States, instead of being the safe and assured evidences of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the Land Office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the Government to annul his title.'

"On the whole, our conclusion is that the court below ought to have given judgment for the plaintiff, as against the defendant, to the center of Wolf lake, instead of to low-water mark, in front of the southeast fractional quarter of section 19, and in front of the northeast fractional quarter of section 30; and to the middle of the bay or projection of said lake in front of the east part of the southeast fractional quarter of said section 30."

In Mitchell *vs.* Smale, at page 412 of the opinion, the court said:

"Our general views with regard to the effect of patents granted for lands around the margin of a non-navigable lake, and shown by the plat referred to therein to bind on the lake, were expressed in the preceding case of Hardin

vs. Jordan, and need not be repeated here. We think it a great hardship, and one not to be endured, for the Government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often *the* most valuable part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned. The pretense for making such surveys, arising from the fact that strips and tongues of land are found to project into the water beyond the meander line run for the purpose of getting its general contour, and of measuring the quantity to be paid for, will always exist, since such irregular projections do always, or in most cases, exist. The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which by its exclusions and inclusions of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream. The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed, and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow.

"We do not mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake or be guilty of a palpable fraud; in which case the Government would have the right to recall the sur-

vey, and have it corrected by the courts or in some other way. Cases have happened in which, by mistake, the meander line described by a surveyor in the field-notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the Government. Nor do we mean to say that in granting lands bordering on a non-navigable lake or stream the authorities might not formerly, by express words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective States of all swamp and overflowed lands therein this cannot be done.

"In the present case it cannot be seriously contended that any palpable mistake was made, or that any fraud was committed, by the surveyor who made the survey in 1834–'5. It is apparent from the finding of facts that the lake in question is subject to considerable changes in the height and depth of the water therein. A *datum*, or bench-mark, is used in Cook county, Illinois (where the premises in question are situated), as a standard of comparison for the height of water in Lake Michigan. Of course the height of water in Wolf lake is affected by that of Lake Michigan, since they are connected by two different outlets. The finding of facts states that the level of water in the lake in question, when the Government survey was made in 1834–'5, was 2.2 feet above the *datum*, and four-tenths of a foot above the average level of Lake Michigan, which is 1.8 feet above *datum*. But it also states that Lake Michigan, at times, rises to five feet above *datum*, which would cause the lake in question to rise to a level of 2.8 feet (or nearly 3 feet) higher than it was when the Government survey was made. At such times, of course, very little of the said projecting tongue would be visible. But whether so or not, it would not alter the case. The existence of such projecting tongue is entirely consistent with the water or lake being the natural boundary of the plaintiff's land, which would include the said projection, if necessary, in order to reach the said boundary. It has been decided again and again that the meander line is not a boundary, but that the body of water whose margin is meandered is the true boundary. (Citing authorities.)"

To both of these opinions Mr. Justice Brewer, Mr. Justice Gray, and Mr. Justice Brown dissented. The dissenting opinions, written by Mr. Justice Brewer, were based upon the proposition that the majority of the court had misinterpreted the law of Illinois as to the rights of riparian owners. But these dissenting opinions strengthen the opinions of the majority of the court in so far as the same are applicable to the case at bar. The dissenting opinions reaffirm the well-established doctrine that the determination of how far the title of a riparian owner extends is one of *local law*, and the decisions and the statutes of the State and of its highest court as to that question furnish the best and final authority. To the same effect are the cases of G. R. & I. R. Co. *vs.* Butler, 159 U. S., 87 (94), and Lowndes *vs.* Huntington, 153 U. S., 1 (19).

Let us, then, see what is the law of the State of Indiana respecting the rights of riparian owners where property borders inland lakes.

II.

INDIANA LAW.

It is the settled law in the State of Indiana that where an inland non-navigable lake covers a portion of a section of land and the Government survey designates the dry land in such subdivision as a fractional subdivision or lot, the purchaser from the Government of such lots acquires title to all that portion of the bed of the lake included in the whole subdivision. This has been repeatedly determined.

Stoner *vs.* Rice, 121 Ind., 51.

Brophy *vs.* Richeson, 137 Ind., 114.

Tolleston Club *vs.* State, 141 Ind., 197; S. C., 38 N. E., 214; 40 N. E., 690.

Tolleston Club *vs.* Clough, 146 Ind., 93; 43 N. E., 647.

Kean *vs.* Calumet Canal & Imp. Co., 150 Ind., 699.
Kean *vs.* Roby, 145 Ind., 221.
Kirwan *vs.* Murphy, 83 Fed., 275.
Forsyth *vs.* Smale, 7 Bissell, 201.

In the case of Stoner *vs.* Rice, 121 Ind., 51, the supreme court announced the law of that State upon this subject. The facts in that case being so similar to those in the case at bar, we quote from the opinion:

"The conclusion we have arrived at is that the owners of lands bordering on non-navigable inland lakes, such as the one described in this case, when the subdivisions of the land are surveyed by running a meander line between the dry land and the water to ascertain the number of acres of dry land, and designating such subdivision as a fractional quarter or a lot, giving the number of acres of dry land, takes the title to all the land contained within the subdivision, that is to say, he takes as a riparian owner and his title includes, and he owns, the land beneath the lake far enough beyond the meandered line and water's edge to make out the full subdivision in which his land is so situated. As in this case the N. W. ¼ of the N. E. ¼ is surveyed and designated as 'lot 1,' the purchaser of lot 1 acquires title to all the land situate within the boundary line of the said N. W. ¼ of the N. E. ¼ of said section, as the same is platted by the Government; and by the survey all the land situate in the N. ½ of the N. W. ¼ of said section was designated as 'lot 3,' and the purchaser of lot 3 acquired title to all the land in said N. ½ of said N. W. ¼ of said section, whether a part of it be covered with water and constitute a part of an inland lake, or part of it be swamp; and the same is true in regard to the S. ½ of the N. W. ¼ designated as 'lot 4.' The survey included all the land and when a portion of a subdivision is covered with water such portion was meandered to determine the amount of such dry land, and the meandered line does not constitute a boundary line.

"It is contended that the riparian owner bordering on a non-navigable lake, like a river, takes to the tread or center of the lake. This rule is impracticable when

applied to lakes. Suppose the lake to be round or nearly so, with riparian owners, as there would be on the north, south, east and west of it, this rule could not be applied; while the rule we have laid down is practicable, and we think a proper rule to be applied in cases of this character. To hold that the meandered line constitutes the boundary would be against the great weight of authority. Indeed, the authorities are almost unanimous against such a doctrine. The weight of recent authorities is to the effect that the owner of the bank owns to the center of the body of non-navigable water at least whether it be a lake or river, and that, if a lake gradually dry up, the owners of the banks become the owners of the bed, each to the center thereof. But we are unable to find a case parallel with the one under consideration, or where the doctrine has been applied to a lake like the one in question or to many of the lakes within this State. Where the body of water is a running stream, being a narrow rivulet at its bend, and growing larger and widening until it enters into another stream still larger or where it is a long, narrow body of water, there is no trouble in applying this doctrine; but when the body of water is surrounded by land and almost circular in form, covering a quarter or half section or more of land, with riparian owners on either side, we cannot say that the owners on the east and west would take to the exclusion of those on the north and south, nor *vice versa*, nor would it do, as it seems to us, to apply a doctrine that would require the running of diagonal lines between the various owners, each reaching to the center of the lake.

"*The true doctrine to apply in the disposition of such land as is covered by the body of such lakes, we think, is that the Government in making surveys included in such surveys all the land within the district surveyed, and if there was a lake or large pond which covered a part of a subdivision it was meandered out and the dry land in such subdivision designated as a fractional subdivision or lot; that in the purchase of such fractional subdivision or lot the purchaser took title to it as a riparian owner with the right to the land, as the water receded within the boundary lines of the subdivision conveyed to the purchaser. In other words, the purchaser acquired title to all the land within the subdivision though it was described as a fractional subdivision or lot. The authorized survey divided all the land within*

the district into subdivisions and if, by reason of water upon a tract of the land, a portion of it was regarded at the time as worthless and unsalable, there was a meander line run to ascertain the amount of dry land, and such subdivision was designated as fractional subdivision or lot, and, although thus described the sale passed title to the whole subdivision." (The italics are ours.)

In Tolleston Club of Chicago *et al. vs.* State, 141 Ind., 197, the court said:

"This was an action for the recovery of certain overflowed lands along the Little Calumet river, in Lake county, and was brought against the appellants by the appellee, The State of Indiana. The land is claimed by the State under provisions of an act of Congress approved September 28, 1850, known as the 'swamp-land act.'

* * * * * * *

"This act has been interpreted in numerous decisions of the court, both State and Federal. After a very full examination of these decisions, this court, in the case of State *vs.* Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379, reached the following, among other conclusions: (1) That the act was a present grant to the several States of the swamp lands therein situated; (2) that whether or not any particular tract was or is swamp land within the terms of the grant was and is a question for the decision of the Secretary of the Interior; (3) that the decision of the Secretary is final, and cannot be overthrown by parol evidence; (4) that it is not necessary that this decision should be evidenced by a patent to the State, but it is sufficient that the lands have been selected as swamp lands, and such selection approved by the Secretary; (5) that when the selection has been so approved, and the particular tracts so identified as swamp lands, the title of the State relates back to the date of the grant, September 28, 1850. From the record it appears that the lands here in controversy were surveyed by the United States surveyors in 1834. On November 21, 1850, the Commissioner of the General Land Office issued instructions for determining what lands fell to the States under the swamp-land act. In these instructions it was said: 'This act clearly and unequivocally grants to the several States those lands which, from being swampy or subject to overflow, are unfit for cultivation.'

The registers of the local land offices were directed to 'make out lists of these lands as early as practicable' according to forms given, 'one copy of which,' they were told, 'you will transmit to the land officers and another to this office.' *The officers were further instructed that 'the only reliable data in your possession from which these lists can be made out are the (field) notes of the surveys on file in your office; and if the authorities of the State are willing to adopt these as the basis of their lists, you will so regard them.' As to the lands in this case, it was admitted by all the parties in open court 'that the State of Indiana, in accepting the swamp lands adopted the same lot numbers as were given in the survey of 1834 for lands bordering upon that impassable morass, and adopted the plats made by the United States surveyors as its plats of swamp lands.'* (Italics are ours.)

* * * * * *

"Doubts having arisen in several cases as to the regularity of the selections of swamp lands made in the several States under the act of September 28th, 1850, Congress, by an act approved March 3, 1857, declared: 'That the selection of swamp and overflowed lands, * * * heretofore made and reported to the Commissioner of the General Land Office, * * * be and the same are hereby confirmed and shall be approved and patented to the said several States.'

"It is contended by counsel for appellee that by this act of March 3, 1857, Congress fully confirmed the title of the State to the lands here in dispute, being those described in the list hereinbefore set out under certificate of the General Land Office, to wit, sections 12, 15, 17, 18, 19, 20, 21, 22, and N. W. ¼ 23, in township 36, range 8 W., and that the title of the State to said lands would have been complete on the passage of said act, even without the issuance of a patent therefor by the Secretary of the Interior, inasmuch as the title so confirmed by act of Congress could not fail by reason of any fault or neglect of duty on the part of the Secretary.

* * * * * *

"Further contention of counsel is that neither in the list nor in the patent is there a description of the lands which the State claims in this action. The lands claimed by the State are within the meander lines of the United States survey, on each side of the Little Calumet river, being a tract about

six miles in length, and from about three-quarters of a mile to about a mile and a quarter in width. In the original field-notes of the survey the region is referred to as a "lake," while on the plat it is marked 'Impassable marsh.' At the time of the United States survey in 1834 the territory was completely covered with water, in which, outside the river proper, there was a heavy growth of cat-tails, wild rice, and other swamp-like products; and there was evidence admitted on the trial without objection that it has been in about the same condition ever since. Duly certified copies of the field-notes and plat of the original survey, as well as of the list and description of the lands, as filed in the General Land Office were in evidence. Such description and plat as made by the surveyor general from the field-notes are conclusive, and the section lines and corners as laid down in the description and plat are binding upon a general government, and upon all other parties concerned. Doe *vs.* Hildreth, 2 Ind., 274.

"The United States surveyors marked all the section corners and also ran the north and south lines across the lake or marsh, marking the points of entrance into and exit from the marsh, and also the points on each bank of the river proper which flowed through the central part of the marsh.

"The sections were all numbered regularly as other sections of a United States survey. A part of each section lies without and a part within the meander line.

"*The sections are therefore as completely defined by corners, section lines, and numbers as any other sections of a United States survey. The whole territory in dispute, including the river itself, is covered by these sections. No land or water is left unsurveyed.*

"*All that is peculiar to the survey is that parts of the sections are without and parts within the meander lines; the parts without the meander lines being subdivided into lots, while the parts within are not marked as subdivided.* In the list certified from the General Land Office, as we have seen, the sections in question are described as 'All of 12, 15, 17, 18, 19, 20, 21, 22, and the N. W. ¼ 23.' There can be no doubt of the meaning of this description. It covers all of the sections named both within and without the meander lines.

"But counsel draw our attention to certain figures in red ink, placed before the number of each section in the list, as, '592, 12; 360.70, 15,' etc., and wish us to understand that

the list is to be read, 'All of 592 acres of section 12,' etc., being all of the land in each section outside the meanders. These red entries are evidently office figures and were undoubtedly placed in the list to indicate the acres of dry land in the several sections, being the land outside the meander lines. They do not, however, properly speaking constitute any part of the description of the sections. They simply indicate the dry land and were of use to the officials and to the purchasers of the land in determining the price that should be paid for it.

"As frequently decided, meander lines are not boundary lines, unless expressly made so in the instrument of conveyance. The full title of the grantor to the whole section or other division, named, both within and without the meander line, the wet land as well as the dry passes with the deed (Doe *vs.* Hildreth, *supra*; Ross *vs.* Faust, 54 Ind., 471; Ridgeway *vs.* Ludlow, 58 Ind., 248; Edwards *vs.* Ogle, 76 Ind., 302; Sphuny *vs.* Moore, 120 Ind., 352; 22 N. E., 319; Stoner *vs.* Rice, 121 Ind., 51; 22 N. E., 968; Brophy *vs.* Richeson, 137 Ind., 114; Railroad Co. *vs.* Schurmeier, 7 Wall., 272; Hardin *vs.* Jordan, 140 U. S., 371).

"We therefore conclude that the whole section, in each case, was fully described in the list except as to section 23, of which the northwest ¼ was described, and that the title to all of the land so described and listed was confirmed to the State by the act of 1857.

"What we have said as to the list applies also in great measure to the patent. The objection to the latter is that the sections are here described as fractional, and hence, that the patent does not convey the full sections, but only the parts without the meander lines. The term 'fractional' as applied to the sections named in the patent, refers simply to the circumstance that they do not contain 640 acres each of dry land. As we have seen, however, the sections were fully surveyed; the corners and boundary lines were determined and recorded in each instance. *It follows, from what we have already said, and from the authorities above cited, that the conveyance of the fractional sections carried title to the extreme boundary lines of the sections. All was conveyed.*

"There remained to the United States neither upland nor lowland, whether exposed to the surface or covered by the waters of the marsh or the river. The State took to the section lines.

"The issuance of the patent is still further evidence that the swamp lands named were selected by the State, and that such selection was approved by the proper authorities, although the title of the State, even without the patent, was already complete by virtue of the act of Congress (Edmondson *vs.* Corn, 62 Ind., 17; Hamilton *vs.* Shoaff, 99 Ind., 63; Matthews *vs.* Goodrich, 102 Ind., 557; 1 N. E., 175).

"The chief claim made by appellants to the lands in controversy is based upon a special act of Congress passed in 1870. This act is as follows: 'Whereas, there is lying along the Little Calumet river in the counties of Porter and Lake, in the State of Indiana, a body of land supposed to contain about four thousand acres, which has never been sold or surveyed and which was described in the original Government survey as impassable morass; and, whereas, the Calumet Drainage Company has been organized under the laws of said State for the purpose of draining the valley of said river including said morass therefore: *Be it enacted*,' etc., 'That said unsold lands shall be subject to a lien under the laws of the State of Indiana, for its proper portion of the cost of such drainage, and such lien may be enforced against said lands in the same manner and to the same extent as if the lands were owned by private persons. Provided that no claim shall be held to exist against the United States for such drainage. SEC. 2. *And be it further enacted*, That said lands may be surveyed (*a*) and sold (*b*) to the highest bidder, under the direction of the Secretary of the Interior, subject to said lien.'

"From what we have said as to the survey and title to the lands in controversy it is very clear that the United States had no claim or title to them at the time of the passage of this act. By the swamp-land act of September 28th, 1850, the title to the lands passed wholly to the State, and, so far as these lands are concerned, the act of 1870 is a nullity. It needs no argument to show that if the United States had parted with the title to the lands in 1850, it could not convey title to the same lands in 1870. This counsel for appellants concede and it is plainly the law (Reichert *vs.* Felps, 73 U. S., 160; Wright *vs.* Roseberry, 121 U. S., 488; 7 Sup. Ct., 985; Brophy *vs.* Richeson, *supra*).

"Appellants' claim, therefore, based upon the act of 1870 and mesne conveyances of lots into which the tract in dispute was divided by the resurvey of the land within the

meander lines of the survey of 1834, must fall to the ground The act of 1870, the resurvey and sale of lots pursuant to the terms of that act, and all deeds of conveyance made thereunder are equally void.

"However, it is not necessary that appellants should show any title in themselves in order to defeat the title claimed by the State. The State having brought this action for possession and to quiet its title to the lands, must prove that title good, and it is enough to defeat the claim of the State if the appellants can show that neither the State nor the appellants themselves, the present occupants of the land, are the owners thereof, but that the title is in third parties.

"This contention is earnestly made by appellants. They say that if the act of 1870 was void, and if the State acquired good title to the lands under the act of 1850, that title passed from the State when it conveyed the fractional sections along the meander lines, and that those parts of the several sections within the meanders are now owned by the holders of the corresponding parts of the same sections without the meanders.

"By the survey of 1834, as we have already seen the section corners of each of the sections in controversy were located. All boundary lines of the sections were also located, except that lying along the bed of the river, or over the deep water of the marsh or lake; but the ends of this line, the corresponding corners of the section, having been located, the line itself became thus determined, and might be drawn upon the plat.

Doe *vs.* Hildreth, *supra*, at p. 277.
Section 2396, R. S. U. S.

"The field-notes show that the whole territory now in dispute was covered with water. In these field-notes the locality is always referred to as the 'lake,' the 'river,' or the 'water,' and sometimes as 'river' or 'lake,' while the river proper is referred to as 'main channel' or 'the river water flowing through the lake.'

"The only meander lines run—the only ones that could be run on account of the water—were the meanders which include the territory now in question. The field-notes of the meander line on the west side are headed: 'Meanders

of Calumic river from post in west boundary (of township), thence up stream on right bank.'

"And for the meander line on the east side: 'Meanders of the Calumic river from post on E. boundary (of township), thence down stream on the left bank.'

"The meander lines thus described inclose all the lands here claimed by the State. The river or channel proper was not otherwise meandered, the intersection of its banks with the north and south section lines only being located.

"The territory within the meanders was then, and has continued to be ever since, covered with water during the greater part of the year. The field-notes state that the water was then from one to ten feet deep.

"The meander lines crossing the sections were not made boundary lines in the list of swamp lands certified from the General Land Office, nor in the patents given by the State when the fractional sections were sold. The sections as surveyed were conveyed to the State.

"The plat of the survey shows that the parts of the sections outside the meander were divided into 'lots' which were numbered separately from each section.

"The patents made by the State, in most instances show a conveyance of these 'lots' by their number and section.

"Indeed, it was admitted on the trial by all parties, in open court, 'that the State of Indiana, in excepting the swamp lands, adopted the same lot numbers as were given in the survey of 1834 for lands bordering upon that Impassable Morass, and adopted the plats made by the United States surveyors as its plats of swamp lands, and that the lands afterwards sold by the State of Indiana as swamp lands along and bordering this "Impassable Morass" were sold according to surveys and plats, which were exact copies of the survey and plats including numbers of lots, dimensions and acreage of same, as marked thereon made by the United States surveyors at the original survey of 1834.'

"If the State sold the sections by their numbers simply, as in the General Land Office list or as fractional sections, as in the patent from the United States, there would be little question that the entire sections were conveyed. Even if the parts within the meander were all sold, as some of them were, as quarter or quarter-quarter sections, or by some other exact subdivision, there would be as little doubt that the subdivision so named would be fully conveyed. This counsel

tacitly admit. But because the sales made by the State were in most cases made by lot numbers, it is argued that only the dry land outside the meander line was conveyed.

"As already said, a meander is not a boundary unless expressly made so. If the meander line in this case were actually or by necessary implication made a boundary of the lands sold, it is of course evident that such boundary would stand, just as any other boundary named or described. Such was the case in Edwards *vs.* Ogle, 76 Ind., 302; also in Brophy *vs.* Richesen, 137 Ind., 114, both already cited.

"But by the admission at the trial and from an examination from the State patents in the record it appears that the meander was not made a boundary line in the sales made by the State. On the contrary, the State, in making its sales, adopted the plats and lot numbers of the United States survey, with dimensions, acreage, and numbers all as made in the original survey of 1834.

"It seems very clear that whatever the State received from the United States she conveyed fully in her patents to the purchasers of the same lands, all described as in the survey upon which she bases her own claim to the lands.

"Section 20, for example, in this survey, was divided into four lots, numbered 1, 2, 3, and 4. If the land were sold as section 20, or as lots 1, 2, 3 or 4 of section 20, there could hardly be any doubt that the purchaser would acquire all that the State could convey within the four section lines. The principle, however, could not be different if one or two of the lots were sold separately. The lot lines, if extended to the opposite line of the section, would bound the purchase. The meander could have nothing to do with the matter, as that is used not as a boundary but to indicate the quantity of dry land, and to mark the limit where it was possible for the surveyors to work. All beyond was 'water,' 'lake,' 'river,' or 'impassable marsh.' It may be observed that the riparian doctrine, strictly speaking, does not apply here. In none of the conveyances was the land bounded by the river, by the lake, or by the morass, if there is such a thing as a meander of marsh or morass. No survey was made to or abutting on the river or its meander. The sections were surveyed in full, each one mile square containing 640 acres. The section or parts of sections sold, therefore, extend not to the morass or to the river but to the opposite section lines.

"Were the survey or any of the land bounded on the river,

the lake, or the morass, then undoubtedly the riparian doctrine would apply and the land described would extend to the thread of the Little Calumet or Calumic river. As it is, all the land is bounded by section lines.

"We are, therefore, of opinion that the State received good title to all the land in controversy by virtue of the act of Congress of 1850, and that the State, in selling this tract, conveyed to its grantees all the land so received in the respective sections, both within and without the meander lines. This conclusion, we are satisfied, is fully sustained by the authorities cited."

And on a rehearing in the same case the court, going a little more fully into the subject, said:

"With their petition for a rehearing of this case counsel for appellee here filed a very earnest and able brief, to which reply has been made by counsel for appellants. Other briefs have also been filed on both sides.

"Appellee's principal contention is that 'the court erred in holding that the swamp land in controversy had been surveyed either by the Government of the United States or by the State of Indiana at the time of the sale of such border lots' by the State.

"It seems to us that this is dangerous ground for appellee to stand upon.

"We think it was shown in the original opinion that the lands in question were surveyed by the United States Government in 1834. The several sections were surveyed and numbered by the deputy surveyors, and this is all that is required by law to be done in the field. The remaining work may be done in the office.

"By the third clause of section 2395, R. S. of the United States, it is provided that: 'The township shall be divided into sections containing, as nearly as may be, six hundred and forty acres each, by running through the same, each way, parallel lines at the end of every two miles, and by taking a corner on each of such lines at the end of every mile. The sections shall be numbered respectively, beginning with the number one in the northeast section and proceeding west and east alternately through the township with progressive numbers till the thirty-six be completed.'

"For cases where boundary lines and corners have not been,

or could not be, actually run or fixed, provision is made in clause second of section 2396 of the same statutes, as follows:

"'The boundary lines actually run and marked in the surveys returned by the surveyor general, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof. And the boundary lines which have not been actually run and marked shall be ascertained, by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines as the case may be, to the water-course, Indiana boundary line, or other external boundary of such fractional township.'

"In connection with these statutes, it is said in Matthews' Guide to the Public Lands (page 114) that: 'The sections of one mile square are the smallest tracts, the outboundaries of which the law requires to be exactly surveyed. Their minor subdivisions, represented in lines drawn on the township plats, are not surveyed and marked in the field. They are defined by law, and the surveyors general, in protracting township plats from the field-notes of sections, merely designate them in red ink, the lines being imaginary, connecting opposite quarter-section corners in each section from south to north, and from east to west. * * * This convenient mode of subdividing sections with a view to economy and to facilitate sales of small tracts, although not actually marked on the ground by metes and bounds, yet, under laws of Congress, are susceptible of demarkation by any surveyor in the different States and Territories in accordance with the field-notes of the original survey made by the United States officers.'

"To make a legal survey in this case, therefore, it was only necessary to actually run the section lines every two miles, to mark a corner on each of such lines at the end of every mile, and to number the several sections. Even more than this was actually done by the surveyors in the field. The law then provides a means for ascertaining 'boundary lines which have not been actu-

ally run and marked,' namely, 'by running straight lines (on the plats in the Land Office) from the established corners to the opposite corresponding corners.' With these provisions of the law, with the two-mile parallel lines actually run, and the eighty-chain, or mile, corner points marked on each line, any surveyor, using the original field-notes, could have no trouble in locating the several lines, corners, and subdivisions. The land in controversy was, therefore, surveyed into sections, as provided by law, by the United States Government surveyors in 1834.

"But, even if we were mistaken in this, it would, as we have said, be a dangerous contention for appellee to undertake to show that such survey was not made.

"The swamp-land act of 1850, under which the States claim title, requires that the lands should be selected, and the selections approved by the Secretary of the Interior, as swamp lands. The land in dispute consists of parts of surveyed sections of land, selected, approved, and certified from the General Land Office of the United States. The land so selected is described as in 'township No. 36, range 8 west,' and being 'all of * * * (sections) 12, 15, 17, 18, 19 and 20. All of 21 and 22 (and) N. W. ¼ 23.'

"But, if there were in fact no survey, then no such sections would exist, at least between the meanders of the Calumet river; and so no selections would ever have been made by the State, or approved by the Secretary of the Interior. The consequence would be that the State had never received title, and the unsurveyed lands having remained in possession of the General Government, were correctly surveyed and sold under the act of Congress of 1870. If, therefore, we should admit this main contention of counsel for appellee, the consequence would inevitably follow that the State had never acquired title to the land in dispute. We are satisfied, however, that the conclusions reached in the original opinion, that the lands were surveyed in 1834; that they were selected and the selections approved under the swamp-land act of 1850; that the State therefore acquired good title under that act; and that the act of 1870, with the resurvey and sales thereunder, was a nullity, are all correct; and we are quite unable to understand why counsel should here insist upon a contention which if agreed to, would cut the ground entirely from under their own feet.

"The other principal contention of counsel for appellee

in this petition is that the meanders of the Calumet river are boundaries of the marginal lots in the several sections, as sold by the State. This cannot be admitted. It is contrary to all the authorities. Meanders are not boundary lines, unless expressly made so in the instruments of conveyance.

"In the present case, had the marginal lots along either side of the river been sold without reference to the sections, the purchasers would most certainly have taken title, not to the meanders simply, but to the thread of the stream. This, too, is according to the practice and instructions of the Land Department, to which counsel refers so confidently.

"Secretary of the Interior Vilas, February 27, 1888, on the petition of James Hemphill for the survey of a point of land or island extending beyond the meander line into Goose lake in Michigan, held (quoting from Railroad Co. *vs.* Schurmeir, 7 Wall., 286), that 'meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers (and as well upon inland lakes of water), not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as a means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser,' and hence that the application for a survey of the point of land beyond the meander should be denied: that is, in effect, that the title to the point of land in question was in the owner of the adjacent land within the meander line. See, also, decision of the Commissioner of the General Land Office of November 28th, 1884 (case of May, 3 Land Dec. Dep. Int. 200), and decision of Secretary Teller, July 11, 1883.

"In the latter—an Indiana—case (case of Richardson, 11 Copp's Land Owner, 284), it is said, 'The grants made by the Government of the lands lying on the lake are not limited by the meander line, but extend at least to the permanent waters of the lake.'

"In the case of Railroad Co. *vs.* Schurmeir, *supra*, it is said, further, by the Supreme Court of the United States, that: 'In preparing the official plat from the field-notes, the meander line is represented as the border line of the stream, and shows to a demonstration, that the water-course, and not the meander line, as actually run on the land, is the boundary. Proprietors bordering on streams not naviga-

ble, unless restricted by the terms of their grant, hold to the center of the stream.'

"The Schurmeir case has been the leading authority on this subject since the delivery of the opinion of the court.

"In the case of Forsythe *vs.* Smale, 7 Biss., 201, (Fed. Cas. No. 4950,) Judge Drummond, citing Railroad Co. *vs.* Schurmeir, *supra*, stated the rule in like manner as to meander lines, holding that 'in relation to streams not navigable, the law has always been that the purchaser takes the land to the center of the stream,' and that 'where land is purchased bordering upon a non-navigable stream, and the line is meandered upon the stream for the purpose of quantity, and the stream is intended as the boundary of the land, the grant includes any land between the meander line and the water.' See, further, Gould on Waters, section 78 and notes; Angell on Water-courses, section 10, and following sections and notes.

"In Jones *vs.* Janney, 8 Watts & S., 436, 42 Am. Dec., 309, it was held that a 'conveyance of lands bordering on flats of rivers passes the flats as appurtenances, unless they are expressly excluded.' See also, Ashby *vs.* Eastern Railroad Co., 5 Metc. (Mass.), 368; 38 Am. Dec., 426.

"In Felder *vs.* Bonnett, 2 McMull. Law (S. C.) 44; 37 Am. Dec., 545, the court held that a survey calling for boundary designated as 'Dean swamp' includes land to flowing stream or current of swamp, where such exists, and does not extend merely to external lines of low and marshy ground.

"In Kraut *vs.* Crawford, 18 Iowa, 549; 87 Am. Dec., 414, the court held that a meander line is not a boundary line; citing Middleton *vs.* Pritchard, 3 Scam., 510; 38 Am. Dec., 112, 'Where it was decided that the riparian proprietor owned the low ground or peninsula outside the meander line.'

"Even, therefore, if the land had not been fully surveyed, and the section lines and corners were not all determined, as urged by counsel for appellee, and even if the survey terminated on the bank or edge of the morass on each side of the river, still the parties purchasing the lots abutting upon this morass or the meander line would take to the middle or thread of the stream. Nor can reservations be implied in case of conveyances of lands along streams. 'When, therefore, the Government has surveyed its lands along the bank of a stream, and has sold and conveyed such

lands by governmental subdivisions, its patent conveys the title to all islands between the meander line and the middle thread of the river, unless, previous to such patent, it has surveyed such islands as governmental subdivisions, or expressly reserved them, when not surveyed.' Butler *vs.* Railroad Co., 85 Mich., 246; 24 Am. St. Rep., 84, and cases there cited.

"Nor will it do, especially in view of the foregoing authorities, for counsel to say that the meanders in the case before us are not meanders of the river. The field-notes show that the whole territory between the meander lines was covered with water, while the evidence shows that it is still so covered. The river, so called, was the central or flowing part of this body of water. Meander lines, from their very nature, being intended to mark the sinuosities of a stream, are run as close to the water as can conveniently be done by the surveyors. In this case, as the field-notes show, the meanders could not be run any closer to the river than they were actually run. In addition to this, the field-notes actually named the lines as meanders of the river; the language used being 'meanders of Calumic river.'

"The meander is, therefore, merely a mark for the line of the river, being laid off as near to the river bank as the surveyors could work. It means the river, and is not itself a boundary, but only indicates the location of the true boundary, which is the river itself. If, therefore, we proceed on the theory of the appellee, we should still have to hold that the lands in controversy belong to the owners of the border lots on each side of the river.

"But as, in fact, the contention of the appellee that the land was not surveyed is not true, but the whole tract was surveyed into sections of land, and the border lots sold as lots of those sections, we held in the original opinion and still hold that the title of the purchasers of these border lots extended to the opposite lines of the sections. There was nothing else to limit them, the stream itself being included in the lines of the survey.

"*We may here remark that, so far as concerns the marginal lots, the Beaver Lake cases* (*State vs. Portsmouth Sav. Bank*, 106 *Ind.*, 435, 7 *N. E.*, 379, *and State vs. Milk*, 11 *Biss.*, 197, 11 *Fed.*, 389) *are not in point. Beaver lake was a large body of water of shallow depth, which had not been surveyed by the United States Government. Indeed, the cases themselves are au-*

thorities for the conclusions here reached. In The State vs. Milk it is said: 'That while a general grant of land on a river or stream, non-navigable, extends the line of the grantee to the middle or thread of the current, a grant to a natural pond or lake extends only to the water's edge,' citing numerous authorities." (Italics are ours.)

We respectfully submit that these decisions of the supreme court of Indiana, involving the same general facts, if not indeed the title to these particular lakes in the beds of which plaintiffs in error now claim some rights, have conclusively determined adversely to the plaintiffs in error the claims which they are now urging.

This court in the *Hardin* case, and the supreme court of Indiana in the *Tolleston* case and in this case, have shown in a manner more clearly than is within our power the inapplicability of the decisions respecting Beaver lake to the case at bar.

III.

THE DECISION OF THE COMMISSIONER OF THE GENERAL LAND OFFICE AND OF THE SECRETARY OF THE INTERIOR RESPECTING THE SURVEY OF 1876 AND THE ISSUE OF PATENTS THEREUNDER IS NOT *res adjudicata*.

While it is true that a patent for land when issued by the Land Department, acting within the scope of its authority and delivered to and accepted bythe grantee, passes the legal title to the land, and while it is also true that when there is a question of contested rights between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the Land Department to decide that question, and that the decision of tbat Department on matters of fact within its jurisdiction, made in due course of administration, cannot be called in question collaterally, yet, it is equally true that when a patent has been awarded, delivered, and accepted, thenceforth all right to control the

title or to decide the right to the title has passed from the Land Office. Not only has it passed from the Land Office, but it has passed from the Executive Department of the Government.

Moore *vs.* Robbins, 96 U. S., 530.
Hardin *vs.* Jordan, 140 U. S., 371.
Mitchell *vs.* Smale, 140 U. S., 406.
Davis *vs.* Weibbold, 139 U. S., 507.

This court has also repeatedly decided that if lands patented or attempted to be patented were not at the time public property, *having been previously disposed of*, the Department had no jurisdiction to transfer the lands, and their attempted conveyance by patent is inoperative and void.

See cases above cited, and
Smelting Company *vs.* Kemp, 104 U. S., 640.
Wright *vs.* Roseberry, 121 U. S., 488.
Francœur *vs.* Newhouse, 40 Fed., 618.
Doolan *vs.* Carr, 125 U. S., 618.

We, therefore, say that the cases cited by plaintiffs in error upon the proposition that the decision of the Secretary of the Interior is *res adjudicata* are not in point.

IV.

LIMITATIONS.

Counsel's second point is that this action is barred by the statute of limitations.

This was a question of *fact*, which has been decided against plaintiffs in error both by the trial court and the supreme court of the State of Indiana. (See opinion of supreme court of Indiana above quoted.) If this court would go into the record to determine this question, its conclusion must necessarily, we submit, affirm that of the State courts.

But a jury having been waived, the case tried before the court, and not only the trial court, but the supreme court of Indiana, having decided against plaintiffs in error, this court will not review that question.

It is not a Federal question.

River Bridge Company *vs.* Kansas Pacific R'y Co., 92 U. S., 315.

Murdoch *vs.* City of Memphis, 87 U. S., 590.

In River Bridge Company *vs.* Kansas Pacific R'y Co., *supra*, Mr. Justice Miller said:

"This is a writ of error to the supreme court of the State of Kansas. The contest in the State court concerned the title to real estate, both parties claiming under grants from Congress made at different times. In the district court for the county of Shawnee, where the suit was originally brought, the parties submitted the case to the court without the intervention of a jury, and that court found a series of facts, fourteen in number, on which it declared the law to be for the defendant. This judgment was affirmed on error in the supreme court of the State, which decision the present writ of error brings before us.

"The finding by the district court was received by the supreme court of the State as conclusive as to all the facts in issue, and it is equally conclusive upon us. Where a right is set up under an act of Congress in a State court, any matter of law found in the record, decided by the highest court of the State, bearing on the right so set up under the act of Congress, can be re-examined here.

"In chancery cases, or in any other class of cases, where all the evidence becomes part of the record in the highest court of the State, the same record being brought here, this court can review the decision of that court on both the law and the fact, so far as may be necessary to determine the validity of the right to set up under the act of Congress; but in cases where the facts are submitted to a jury, and are passed upon by the verdict, in a common-law action, this court has the same inability to review those facts in a case coming from a State court that it has in a case coming from a circuit court of the United States.

"This conclusiveness of the facts found extends to a finding by the State court to whom they have been submitted by waiving a jury, or to a referee, where they are so held by State laws, as well as to the verdict of a jury (Boggs *vs.* Merced Mining Company, 3 Wall., 304.)"

Nothing further need be said on this point.

CONCLUSION.

Not only does the evidence in this case show, but this court and the supreme court of Indiana have *found it to be a fact*, that the beds of Wolf lake and Lake George were properly surveyed by the Federal Government in 1834–'35.

The United States, by patent, conveyed to the State of Indiana the lands in controversy, based upon that survey. In that conveyance the Government made no reservations as to the portions of the sections described in the conveyance which were then or are now in the bed of Wolf lake or of Lake George.

This court has held that after the aforesaid conveyance by the Federal Government to the State of Indiana no further title remained in the United States to be in any way disposed of, and that titles founded on the survey of 1876 are void.

It is admitted that the deed by the State of Indiana to the grantors of the defendant in error conveyed the same lands and used the same description as in the conveyance by the United States to said State.

It is the settled law of the State of Indiana that the purchasers of the fractional lots or sections from said State under the survey of 1834–'35 took all of the land in said subdivisions or lots to the limits thereof, and this, irrespective of whether the land was or was not covered by water, whether it was in the bed of a lake or a marsh.

This court having so repeatedly held that the decisions of the State courts are final as to how far the title of a

riparian owner extends, there is no new question here to be passed upon. We, therefore, respectfully submit that the judgment of the supreme court of Indiana should be in all things affirmed.

FREDERICK S. WINSTON,
JAMES F. MEAGHER,
SILAS H. STRAWN,
Attorneys for Defendant in Error.

G. E. HAMILTON,
Of Counsel.

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Supreme Court U.S.
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JAMES H. McKENNEY,
Clerk.

No. 8.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

ANNA R. KEAN et al.,
Plaintiffs in Error,

vs.

THE CALUMET CANAL AND IMPROVEMENT COMPANY,
Defendant in Error.

Error to the Supreme Court of Indiana.

BRIEF FOR DEFENDANT IN ERROR, ON RE-ARGUMENT.

FREDERICK S. WINSTON,
SILAS H. STRAWN,
FOR DEFENDANT IN ERROR.

THE GUNTHORP-WARREN PRINTING CO., 118 RANDOLPH ST., CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

ANNA R. KEAN et al., *Plaintiffs in Error,* vs. **THE CALUMET CANAL AND IMPROVEMENT COMPANY,** *Defendant in Error.*	Error to the Supreme Court of Indiana.

STATEMENT.

MAY IT PLEASE THE COURT:

This action was brought by defendant in error in the Circuit Court for the County of Lake in the State of Indiana, to quiet title to certain lands.

The complaint included a large number of acres of land owned by the defendant in error, the title to which is in no way involved in this controversy, and in which the plaintiffs in error disclaimed any interest. The controversy between the plaintiffs in error and the defendant in error involves but a very small portion of the property included in the decree entered by the Indiana court.

The facts presented by the record in this case are so

concisely stated in the opinion rendered by the Supreme Court of Indiana (150 Ind. Rep., 699) that we will adopt that opinion as a part of our statement. It is as follows:

> "This was an action brought by appellee against appellants and others to quiet title to certain real estate described in the complaint, and situated in S. ½ section 18, and section 19, township 37 N., range 9 W., and in sections 12, 13 and 24, township 37 N., range 10 W., in Lake County. The lands in controversy, together with other lands, were conveyed to the State of Indiana by the United States under the Swamp Land act of 1850, and by the descriptions of the government survey of 1834. By the same descriptions the lands were conveyed by the state to the remote grantors of appellee. Part of the lands are included in what was once the bed of Wolf Lake and the bed of Lake George, but since the survey the waters have, in large measure, receded, leaving the lake beds comparatively dry land.
>
> "In 1875 certain persons, under the assumption that the beds of the lakes had not been surveyed in 1834, procured a resurvey of that part of the lands formerly covered by the waters, and it is through this last survey and the sales made in pursuance thereof that appellants claim title.
>
> "The case before us, therefore, in so far as concerns source of title, does not differ from that of *Kean* v. *Roby,* 145 Ind., 221; 42 N. E., 1011. On the authority of the decision in that case, there can be no question that the resurvey of 1875, as also the sales made thereunder, was wholly invalid, and consequently that appellee's title as based upon the original survey of 1834, and the sales made under that survey, is good. No real distinction in this regard has been shown between the two cases.
>
> "The second contention is that the action is barred by the fifteen and twenty years' statute of limitations. This contention is plainly founded upon the same theory as the first, namely, that the appellants obtained some title or took possession of some kind under the void survey of 1875. As to title, as we have

seen, there was none. As to possession, the court heard the evidence and did not find, nor can we perceive, that the continuous and lawful possession of appellee and its immediate and remote grantors was ever broken by the unauthorized entrance, if any there was on the part of appellants, or any of them. Appellee and its grantors continued to pay the taxes assessed on the lands, by the descriptions in their deeds coming down from the original government survey, and had at all times such possession of and exercised such dominion over the territory as was possible in the case of wild, wet and uncultivated lands. As said by this court in *Worthley* v. *Burbanks,* 146 Ind., 534; 45 N. E., 779, it is manifest that as to adverse possession there can be no absolutely unvarying rule with reference to every kind of real estate. The requirement as to the kind of occupancy of or dominion over land which is necessary to show adverse possession in the case of a cultivated farm, a town lot, or a residence in a populous city, may be quite inapplicable or even impossible in the case of a piece of desert land, or mining claim, a non-navigable lake, a prairie or a forest. The evidence in this case, as we think, was sufficient to show continuous possession by appellee and its grantors of the lands in controversy."

The case of *Kean* v. *Roby,* referred to in the above opinion, is reported in 145 Indiana, page 221. The facts involved in the case at bar are substantially set forth at greater length in *Kean* v. *Roby.*

That was an action brought by Kean, plaintiff in error in this case, against Roby and others, to quiet title to certain lots in section 12, township 37, being one of the sections involved in the case at bar. The appellees in that case claimed title under the original government survey of 1834, and the court found that townships 37 and 38 in range 10 west, in which the land was situated, were originally surveyed in 1834, under the authority of the United States Land Department, as shown by the field notes and

plats made a part of the record. These townships are both fractional, lying next to the state line dividing Indiana from Illinois, and are in part covered by a body of water known as Wolf Lake. Appellees claimed that title to all the land passed from the General Government to the State of Indiana by the Swamp Land act of September 28, 1850. The patent from the United States bore date March 24, 1853, and is the same patent which included the lands involved in this case.

The appellant contended that the bed of Wolf Lake covering part of the sections above described as aforesaid was not surveyed in the original survey of 1834 and showed that on representations to that effect made to the Land Department of the United States, the Commissioner of the General Land Office ordered a resurvey of the land within the meander lines of the lake, which resurvey was made in 1875. Appellant further claimed that on such resurvey by the Land Department the lots in the lake bed became subject to entry and sale and subject also to the right of appellants' remote grantors to locate "Sioux half-breed scrip" thereon, and she traced her title from patents issued for said lots to such remote grantors upon such location of "Sioux half-breed scrip." Appellees, on the other hand, contended that all the fractional sections, including the bed of Wolf Lake, were surveyed in 1834, so that rightfully the Government had no such lands to survey or sell when the order for the survey of 1875 was made and the land in question attempted to be resold by the Land Department.

The question, therefore, was, as in the case at bar, that if the lands in controversy were in fact surveyed in 1834 and sold by the United States under such survey, then it is clear that the Government had no authority or power to re-

survey the lands in 1875, or to sell them over again, and the appellant's title must fail.

The court found, after a careful review of the evidence, that *as a matter of fact* in the original survey of 1834 both townships in question and all the sections were fully surveyed, including the bed of Wolf Lake; that the lines of the survey of 1834 extended over both land and water, and that the United States conveyed to the State of Indiana the entire fractional townships so surveyed. That all the territory in question in the two townships, including that covered by Wolf Lake, as well as the comparatively dry land upon its borders, having passed to the State of Indiana from the United States, by the Swamp Land act of 1850 and the patents issued to the state therefor in 1853, no land in said townships remained, whether under Wolf Lake or elsewhere, which could be resurveyed or resold by the United States. That the resurvey of 1875, and the sales thereunder, were nullities, and that the appellant therefore had no title to the lands claimed by her. The court cited with approval *Tolleston Club* v. *State,* 141 Ind., 197, hereinafter referred to.

Thus we have, in the case at bar, a finding by the State Court, *as a matter of fact,* that all of the land in controversy here, whether it was at the time of the survey in 1834-35 upland or in the beds of Wolf Lake or Lake George, was included in that survey. That the Federal Government pursuant to the Swamp Act of 1850 by its patent of 1853 conveyed all of its interest therein to the State of Indiana, which in turn conveyed by the same description, all the land here in dispute to the remote grantors of defendant in error.

Plaintiffs in error insist, *first,* that their title to lands

in Wolf Lake and Lake George claimed to have been acquired by them under the survey of 1875, is superior to the title of the defendant in error based upon the original survey of 1834, and, *second,* that this action of defendant in error is barred by the Statute of Limitations of the State of Indiana.

In reply to these propositions we maintain:

First. That the Supreme Court of Indiana having found *as a matter of fact* that all of the lands here involved were included in the survey of 1834-35, this court will not review that question.

Second. That the United States having by its patent of 1853, pursuant to the Swamp Act of 1850, conveyed its interest in all of said land to the State of Indiana, and the said State having conveyed the land, by the same descriptions used in its patent from the United States, to the remote grantors of defendant in error, neither the United States nor the State of Indiana had in 1875 any interest whatever in any of the lands. Therefore the survey of 1875 was absolutely void; the Land Department was without jurisdiction to order such survey and conveyances thereunder, and such proceedings did not in any way affect the title of defendant in error to the land in question.

Third. That the determination of how far the title of a riparian owner extends is one of local law, and the decisions of the State Court upon this question are binding upon this court.

Fourth. That the law of Indiana is that the owner of land bordering on a surveyed non-navigable inland lake, such as the lakes described in this case, takes title to all the land contained within the subdivision. That is to say, he takes as a riparian owner, his title includes and he owns

the land beneath the lake far enough beyond the meandered line and water's edge to make out the full subdivision in which the land is situated.

Fifth. That if the common law of Indiana were as stated by this court in *Hardin* v. *Jordan,* to be the common law of Illinois,—that under a grant of land bordering on a non-navigable lake, the grantee takes to the center of the lake—even then, the defendant in error, by virtue of its ownership of the bordering lands, owns to the center of the lakes and consequently all of the land in controversy. That upon any theory or under any rule governing the rights of riparian owners, the survey of 1875 is void as to the defendant in error, and it could not thereby be deprived of its property.

Sixth. That the question of whether the defendant in error complied with the Statute of Limitations of the State of Indiana is a question of fact, upon which the decision of the State Court is final.

ARGUMENT.

I.

THE SUPREME COURT OF INDIANA, HAVING HELD THAT ALL OF THE LAND INVOLVED IN THIS SUIT WAS IN FACT INCLUDED IN THE SURVEY OF 1834-35, THIS COURT WILL NOT DISTURB THAT FINDING OF FACT.

Gardner v. *Bonestell,* 180 U. S., 362 (370).
Egan v. *Hart,* 165 U. S., 188.
Dower v. *Richards,* 151 U. S., 658.
Hedrick v. *A. T. & S. F. R. R.,* 167 U. S., 673 (677).
Republican River Bridge Co. v. *Kansas Pac. R. R.,* 92 U. S., 315.

The Supreme Court of Indiana, not only in the opinion in the case at bar, but also in the opinion of *Kean* v. *Roby,* 145 Ind., 221, *supra,* has held, *as a matter of fact,* that all of the land in question was surveyed by the Federal Government in 1834-35. In *Kean* v. *Roby* the court discusses the evidence upon which that finding is made.

Whether or not the survey of 1834-35 included all of the sections, portions of which were then in the beds of Lake George and Wolf Lake, is a question of fact deducible from the evidence introduced on the trial. That fact, having been found adversely to the claim of plaintiffs in error by the State Court, is conclusive and this court will not disturb the finding.

A case very similar to the case at bar upon this point is *Gardner* v. *Bonestell, supra.* There this court held:

"The trial court, in addition to its findings in refer-

ence to the proceedings in the Land Department, found as independent matter of fact that the land in controvery was outside the exterior boundaries of the grant, and that Throckmorton was not a *bona fide* purchaser. The Supreme Court of the State sustained those findings. Now in proceedings of this court to review the action of state courts, we do not enter into a consideration of questions of fact. We accept the determination of those courts in such matters as conclusive, and inquire simply whether there have been errors of law." (Citing cases.)

II.

ALL OF THE LAND IN QUESTION HAVING BEEN INCLUDED IN THE SURVEY OF 1834-35, THE UNITED STATES HAVING CONVEYED IT ALL UNDER THAT SURVEY TO THE STATE OF INDIANA IN 1853, AND DEFENDANT IN ERROR HOLDING UNDER MESNE CONVEYANCES FROM THE STATE, BY THE SAME DESCRIPTION, THE SURVEY OF 1875 WAS VOID, AND PLAINTIFFS IN ERROR ACQUIRED NO RIGHTS THEREUNDER.

This has been expressly held by the Supreme Court of Indiana in the following cases, respecting the lakes here in question:

Kean v. *Calumet Canal & Improvement Co.*, 150 Ind., 699.

Kean v. *Robey*, 145 Ind., 221.

Following

Tolleston v. *State*, 141 Ind., 197.

And by this court in

Hardin v. *Jordan*, 140 U. S., 371; and
Mitchell v. *Smale*, 140 U. S., 406.

We have, in our statement, referred to the opinions of the

Supreme Court of Indiana in the case at bar, and in the Roby case. The language of those opinions is clear and decisive upon the proposition above stated.

We now turn to the opinions of this Honorable Court in *Hardin* v. *Jordan* and *Mitchell* v. *Smale.*

In the *Hardin case,* at page 400 of the opinion, we find this language:

> "A question is made with regard to the effect of the proceedings which took place before the register and receiver of the local land office, and by appeal, before the Commissioner of the General Land Office and the Secretary of the Interior, in relation to the rights of the Government to survey and grant the lands under Wolf Lake in 1874. Both Hardin and DeWitt were notified of said proceedings and appeared and contested the same; but the decision was against them and in favor of the Government. It is contended that by this decision the question became *res judicata*, and that Hardin and DeWitt and those claiming under them are bound thereby. It is very true that the decisions of the Land Department on matters of fact within its jurisdiction, made in due course of administration, cannot be called in question collaterally. But, as was declared in the recent case of *Davis* v. *Wiebold,* 139 U. S., 507, decided at the present term of this court, 'if the lands patented were not at the time public property, *having been previously disposed of,* or no provision had been made for their sale or other disposition, or they had been reserved from sale, the Department had no jurisdiction to transfer the lands, and their attempted conveyance by patent is inoperative and void.' So that, if the lands had been 'previously disposed of,' the Department has no jurisdiction over them; and the question whether they have, or have not, been previously disposed of is a judicial question, and not determinable by the Executive Department, except for the purpose of governing its own conduct in the administration of its functions. The same principle is involved in *Moore* v. *Robbins,* 96 U. S., 530,

533, 534, where it is said by Mr. Justice Miller, speaking for the court: 'With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel or annul the instrument which he has made and delivered. If fraud, mistake, error or wrong, has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the Government is the party injured, this is the proper course.' Again, referring to the power of the Secretary of the Interior after patent, it is said: 'He is absolutely without authority. If this were not so the titles derived from the United States, instead of being the safe and assured evidences of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the Land Office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the Government to annul his title.'"

In *Mitchell* v. *Smale,* at page 412 of the opinion, the court said:

"Our general views with regard to the effect of patents granted for lands around the margin of a non-navigable lake, and shown by the plat referred to therein to bind on the lake, were expressed in the preceding case of *Hardin* v. *Jordan,* and need not be repeated here. We think it a great hardship, and one not to be endured, for the Government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often *the* most valuable part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession

under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned. The pretense for making such surveys, arising from the fact that strips and tongues of land are found to project into the water beyond the meander line run for the purpose of getting its general contour, and of measuring the quantity to be paid for, will always exist, since such irregular projections do always, or in most cases, exist. The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which by its exclusions and inclusions of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream. The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed, and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow.

"We do not mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake or be guilty of a palpable fraud, in which case the Government would have the right to recall the survey, and have it corrected by the courts or in some other way. Cases have happened in which, by mistake, the meander line described by a surveyor in the field-notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the Government. Nor do we mean to say

> that in granting lands bordering on a non-navigable lake or stream the authorities might not formerly, by express words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective States of all swamp and overflowed lands therein this cannot be done."

Although dissenting opinions were filed in the two cases last cited, there seems to have been no difference of opinion in this court as to the correctness of the law as enunciated in the above quotations.

It should be borne in mind that the facts in the case at bar are much more favorable to the defendant in error than were the facts in the *Hardin* and *Mitchell* cases to the prevailing party in those cases. Here we have a finding by the Supreme Court of Indiana that, as a matter of fact, all the land in question, whether in the bed of the lakes or elsewhere, was actually surveyed in 1834-35. More than that, the defendant in error in our case holds under a patent from the Federal Government all the land in question, made pursuant to and after the passage of the Swamp Act in 1850, while Hardin holds under a patent issued by the government in 1841, prior to the passage of the Swamp Act.

In our case, also, there is no question of any interest of the State or of the United States in and to the land in question. And that is just as true with respect to the land in the beds of Wolf Lake and Lake George as it is with respect to the upland.

The contention of plaintiffs in error is disposed of in the two cases above quoted.

On this point see further,

Moore v. *Robbins,* 96 U. S., 530.

Smelting Co. v. *Kenp,* 104 U. S., 640.
Wright v. *Roseberry,* 121 U. S., 488.
Doolan v. *Carr,* 125 U. S., 618.

We therefore say that the cases cited by the plaintiffs in error, upon the proposition that the decision of the Secretary of the Interior is *res adjudicata,* are not in point.

III.

THE RIGHTS OF THE OWNERS OF LAND BORDERING ON INLAND, NON-NAVIGABLE LAKES ARE SETTLED BY THE LAW OF THE STATE WHEREIN THE LAND LIES.

This principle has been so frequently laid down by this court that we believe any extended comment superfluous. Notwithstanding the difference of opinion in the *Hardin* and *Mitchell* cases upon other points, the court has always been unanimous on this question.

In *Hardin* v. *Jordan,* at page 380 of the opinion, the court said:

> "Such being the form of the title granted by the United States to the plaintiff's ancestor, the question is as to the effect of that title in reference to the lake and the bed of the lake in front of the lands actually described in the grant. This question must be decided by some rule of law and no rule of law can be resorted to for the purpose except the local law of the State of Illinois. If the boundary of the land granted had been a fresh-water river, there can be no doubt that the effect of the grant would have been such as is given to such grants by the law of the State, extending either to the margin or center of the stream, according to the rules of that law.
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> * * * * *
>
> "We do not think it necessary to discuss this point further. In our judgment the grants of the Govern-

ment for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie."

Since the decisions in the *Hardin* and *Mitchell* cases this court has repeatedly reaffirmed that doctrine, particularly in the cases of

Lowndes v. *Huntington*, 153 U. S., 1 (19).
Grand Rapids & Indiana R. R. Co. v. *Butler*, 159 U. S., 87.
Water Power Co. v. *Water Commissioners*, 168 U. S., 349 (363).

IV.

WHAT THEN IS THE LAW OF THE STATE OF INDIANA RESPECTING NON-NAVIGABLE LAKES, AND PARTICULARLY RESPECTING WOLF LAKE AND LAKE GEORGE?

In *Ross et al.* v. *Faust et al.*, 54 Ind., 471, decided in 1876, the court held that the title of riparian proprietors on White River, in said State, extended to the thread of the stream, regardless of the facts that the survey lines of the United States surveyors meandered the banks and did not include the bed thereof, and that such bed was not, in terms, sold to, nor paid for by, purchasers of the lands bordering on such river.

The court said (p. 476):

"But it is claimed that the surveyor made a mistake, and meandered the banks, and failed to survey the bed of a non-navigable stream and that, hence, its bed was not bought and paid for and did not pass to the purchasers of the bordering lands.

This proposition assumes, as a legal principle, that the bed of a stream cannot pass to the purchaser of the

adjoining land unless it is included in the survey and paid for. This is begging the question.

We have already seen, above, that, as to lands bordering on rivers actually navigable, the beds of which, by law, were not to be surveyed and paid for, it is not well settled that the common law does not apply and carry the title of the riparian purchaser to the thread of the stream."

And further (p. 478) the court said:

"Public policy, as has been already said, dictates the private ownership of the bed of non-navigable rivers.

The facts, then, that the bed of the river was not surveyed nor paid for, do not, necessarily, exclude it from the ownership of the adjoining proprietors; and as to the fact, if it be so, that it was not paid for, we may observe that it is a circumstance of little importance. The Government was not selling her public lands for the purpose of making money. She did not sell them for their value. She was selling them for an almost nominal price, a dollar and a quarter an acre—enough to cover the cost of survey and sale, possibly a little more. Her object was to induce the settlement in the country of a hardy, land-owning people. Her surveys of the whole were more or less inaccurate. We know, as a matter of general knowledge, that often sections exceed and often fall short of the quantity paid for, to a greater extent than was produced by the mistake of the surveyor, in this case, touching the fact of the navigableness of the stream. It could have produced a loss of but a very few dollars. On the other hand, we have the clearly expressed intention of the grantor, expressed by a solemn legislative enactment, that the title should pass, to the thread of the stream.

And the mistake of the surveyor is not one occasioning a loss of such pecuniary amount that it would be regarded as sufficiently affecting the fairness of a private contract, to violate it. We think the title of riparian proprietors on White River, in Marion County, Indiana, extends to the thread of the stream, notwithstanding the bed of the stream was not surveyed

by the United States surveyor, nor, in terms, sold to purchasers of the bordering lands."

In *Ridgway et al.* v. *Ludlow*, 58 Ind., 248, decided in 1877, one of the questions for decision was, whether the owner of lands bordering on the margin of a non-navigable lake, by virtue of such ownership, was also the owner of the land extending under the water, to the thread, or a line along the middle of the lake. The court said, in deciding the question, that the ruling in *Ross* v. *Faust, supra,* governed, and that it could see no difference in principle, whether the rule applied to non-navigable rivers or non-navigable lakes, *when they are within the congressional surveys;* and that the owner of the land bordering on a non-navigable lake, *lying within the congressional survey,* is the owner of the bed of the lake, to the thread thereof.

In *Edwards* v. *Ogle*, 76 Ind., 302, decided in 1881, a pond, as well as its margins, had been originally surveyed as public land. The appellant claimed that, inasmuch as his tract of thirty-nine acres bordered on the marshy pond, his title extended to the center of the pond, and was not confined to the boundary defined by the survey.

The court held that a purchaser of land bordering on non-navigable water could not maintain a claim of title to the center of the water, *where such claim would overlap the section lines, as surveyed.* The cases of *Ross* v. *Faust* and *Ridgway* v. *Ludlow, supra,* were commented upon as follows (page 307):

"Counsel for the appellant refer us, in support of their position, to *Ross* v. *Faust,* 54 Ind., 471, and *Ridgway* v. *Ludlow*, 58 Ind., 248; but the facts in those cases differed essentially from those in this case. *Ross* v. *Faust, supra*, involved the question of riparian rights of the owners of land bordering on White River, in Marion County. The bed of the river had not been

surveyed as a part of the public domain, but, on the theory that White River was a navigable stream, the government surveys had been terminated at the margin thereof. It was held that the water course in question was not a navigable river, and that the owners of land on its banks took to the thread of the stream.

"*Ridgway* v. *Ludlow, supra,* presents this state of facts, as we understand them. A lake covered a portion of the southeast quarter of a certain section of land, and the larger portion of the southwest quarter, and extended over into the section adjoining on the west. The survey showed no subdivisions of less than a quarter section. A narrow strip of land extended from east to west between the lake and the south line of the southwest quarter of the section. The west half of this strip had been conveyed by metes and bounds, which carried the northern boundary to the south shore of the lake, but did not mention that as the boundary, and it was held that the deed gave the grantee title to the center of the lake. The case does not state the phraseology of the patent from the United States to the party through whom the claimant derived his title; but there is nothing to indicate that the dry land had been separately surveyed and patented by the Government, nor that, by extending the boundary of the grant to the center of the lake, it would absorb and override the line of any legal subdivision of the quarter section."

State v. *Portsmouth Savings Bank*, 106 Ind., 435, decided in 1886:

This involved Beaver Lake, a body of water covering some 17,000 acres of land, from four to five miles in length, and from two to four miles in width. There was no survey made, nor attempted to be made, of the lake, or any part thereof. The court held that the bed of the lake was not in a condition to be sold, and hence there was no authority to dispose of the same, directly or indirectly. Under the peculiar facts in the case, the court held that a purchaser of land, in surveys bounded by the lake, acquired

no title to the bed. Upon reaching this conclusion, the court made the following reservation:

> "Whether or not this court would, in all cases, as between private parties, apply the doctrine of the above authorities in its strictness, and to its full extent, is a question we need not here determine."

The court also referred to the cases of *Ross* v. *Faust*, *Ridgway* v. *Ludlow*, and *Edwards* v. *Ogle*, *supra*, in the following language:

> "These cases are not controlling here. Neither of them involved swamp lands granted by the State. The first involved the rights of riparian proprietors upon an unnavigable river, and in the others *their rights were limited by the subdivision in which their lands were situated.* We decide nothing here in conflict with those cases, nor do we, by anything that is said in the case before us, intend to either extend or limit those cases."

In referring to the decision in the Beaver Lake case, the Supreme Court of Indiana, in *Kean* v. *Robey*, *supra*, holds:

> "The other objection made is that, in the Beaver Lake case, *State* v. *Portsmouth Savings Bank*, 106 Ind., 435, this court decided that the sale of the border lots on Beaver Lake, under the original government survey, did not carry title to the lands covered by the waters of the lake. The case is not in point, for the very good reason that, in the Beaver Lake case, the lands under the lake were not surveyed; the survey ceased at the borders of the lake. In the case of Wolf Lake, however, as we have seen, the lake itself was included in the survey; the section lines passed over and included the waters, as well as the land. Had Beaver Lake been actually surveyed as Wolf Lake was, the matter would be different; as it is, that case is not in point. The case at bar is ruled by the *Tolleston Club case, supra.*"

In the *Tolleston Club case* (*Tolleston Club of Chicago* v. *State*, 141 Ind., 197), the court said:

> We may here remark that, so far as concerns the marginal lots, the Beaver Lake cases (*State* v. *Portsmouth Savings Bank*, 106 Ind., 435, 7 N. E., 379; *State* v. *Milk*, 11 Biss., 197, 11 Fed., 389, are not in point. Beaver Lake was a large body of water of shallow depth, which had not been surveyed by the United States Government."

Another case involving the title to Beaver Lake is that of *State of Indiana* v. *Milk*, decided by the late Judge Gresham, sitting as circuit judge in the Federal Court for the Northern District of Indiana, on April 18, 1882, and reported in the 11th Federal Reporter, at page 389.

In that case the court held the rule to be that, while a general grant of land on a river or stream, non-navigable, extends the line of the grantee to the middle or thread of the current, a grant to a natural pond or lake extends only to the water's edge.

This court in *Hardin* v. *Jordan*, 140 U. S., 371, commented upon this departure from the common law rule, and, after quoting Judge Gresham's argument, used this language (p. 397 of the opinion):

> "We do not think that this argument *ab inconvenienti* is sufficient to justify an abandonment of the rules of the common law, which, as we have shown, have been adopted in Illinois as the law of the land. It is too much like judicial legislation. It is as much as to say: 'We think the common law might be improved, and we will, therefore, improve it.' As to the supposed difficulty or inconvenience in applying the law, it is no greater than that which occurs on any bay or incurved shore, even of a large river, in adjusting the outgoing boundary lines between adjoining proprietors over the submerged bottoms of flats lying in front of their riparian lands. Just and equitable rules have been adopted for settling the mutual rights of parties in such cases. Where a lake is very long in comparison with its width, the method applied to rivers and

streams would probably be most suitable for adjusting riparian rights in the lake bottom along its sides, and the use of converging lines would only be required at its two ends. But whatever mode of determining the outgoing lines, as between adjoining owners, should be adopted in special cases (which may be left for determination when they arise) there can be no difficulty in the present case as between the plaintiff and the defendant. The latter is not an adjoining owner. The controversy here is between a riparian owner and a party claiming the lands under water in front of him; and as between them, we think there is no question as to the riparian owner's right."

Stoner v. *Rice, State Auditor*, 121 Ind., 51, was decided in 1889. The facts are nearly identical with those in the case at bar. The appellant was the owner of three lots bordering upon a non-navigable lake, having derived his title by mesne conveyances from the United States. By virtue of such conveyances and ownership he claimed to own the land beneath the water of the lake. Appellee contended that the appellant, by such conveyances, only acquired title to the dry land; that the meander line around the border of the lake constituted the border line of appellant's land. Acting upon that theory, appellee, in the year 1884, procured a survey of the lake within the meander line to be made by the General Government, and platted the same. Such survey and plat were made by the Commissioner of the General Land Office, who was also *ex-officio* Surveyor General of Indiana, and the same was adopted and approved by the Secretary of the Interior. Appellee also procured a patent to be issued by the United States to the State of Indiana for the same March 17, 1885.

The court held that the owners of lands bordering on non-navigable inland lakes, such as the one described in the

case, when the subdivisions of the land are surveyed by running a meander line between the dry land and the water to ascertain the number of acres of dry land, and designating such subdivision as a fractional quarter or a lot, giving the number of acres of dry land, takes the title to all the land contained within the subdivision; that is to say, he takes as a riparian owner, and his title includes and he owns the land beneath the lake far enough beyond the meandered line and water's edge to make out the full subdivision in which his land is so situated.

It was contended that the riparian owner bordering on a non-navigable lake, like a river, took to the thread or center of the lake. This rule was held to be impracticable when applied to lakes, the court saying:

> "Suppose the lake to be round, or nearly so, with riparian owners, as there would be, on the north, south, east and west of it, this rule could not be applied; while the rule we have laid down is practicable, and we think that the proper rule to be applied in cases of this character. To hold that the meandered line constitutes the boundary would be against the great weight of authority. Indeed, the authorities are almost unanimous against such a doctrine. The weight of recent authorities is to the effect that the owner of the bank owns to the center of the body of non-navigable water, at least, whether it be a lake or river, and that, as a lake generally dries up, the owners of the banks become the owners of the bed, each to the center thereof; but we are unable to find a case parallel with the one under consideration, or where the doctrine has been applied to a lake like the one in question, or many of the lakes within this state. * * * *The true doctrine to apply, in the disposition of such land as is covered by the body of such lakes, we think is that the government in making surveys included in such survey all the land within the district surveyed, and if there was a lake or large pond, which covered a part of a subdivision, it was meandered out, and the*

dry land in such subdivision designated as a fractional subdivision or lot; that in the purchase of such fractional subdivision or lot the purchaser took title to it as a riparian owner, with the right to the land, as the water receded, within the boundary lines of the subdivisions conveyed to the purchaser. In other words, the purchaser acquired title to all the land within the subdivision, though it was described as a fractional subdivision or lot. The authorized survey divided all the land within the district into subdivisions, and if, by reason of water upon a tract of the land, a portion of it was regarded at the time as worthless and unsalable, there was a meander line run to ascertain the amount of dry land, and such subdivision was designated as fractional subdivision or lot, and, although thus described, the sale passed title to the whole subdivision."

In *Brophy* v. *Richeson,* 137 Ind., 114, decided February 13, 1894, a patent of land covered "the S. E. Fr. Qr. Sec. 21, * * * containing 95.31 acres," and the patentee conveyed the land by the same description. The plat of the original government survey thereof showed that the 95.31 acres lay north and east of the meander line of Cicott Lake, and that south of the lake, and lying between it and the south line of the quarter section, was a small projection of land, containing .98 acre. The Supreme Court of Indiana, following *Stoner* v. *Rice,* held that the patentee's grantee acquired title to the whole quarter-section, including the portion covered by the lake and .98 acre south of the lake.

In *Tolleston Club of Chicago* v. *State,* 141 Ind., 197, decided in 1894, the court held that where, under a patent from the United States, the State acquires title to a section of land partly within and partly without the meander line, and the dry land without the meander line is divided into lots, and there is nothing to indicate that it was intended to bound the lots by such meander line, a patent

from the State of one of the lots, describing it by number and section, conveys the whole thereof to the opposite section line.

In that case an application for rehearing was made, and denied. In denying the rehearing the court went again somewhat elaborately into the facts, and reaffirmed its previous decision. This was followed by *Tolleston Club of Chicago* v. *Clough,* 146 Ind., 93, decided in 1896.

The law of Indiana, as laid down by the cases hereinabove referred to was reaffirmed by the decision of the Supreme Court of that State in the case of *Kean* v. *Roby,* 145 Ind., 221, decided in 1896, and in the case at bar, decided in 1898, which we have already noticed.

We therefore submit that it is the settled law in the State of Indiana that, where an inland, non-navigable lake covers a subdivision of land, and the government survey designates the dry land in such subdivision as a fractional subdivision, or lot, the purchaser from the government of such subdivision or lot takes the title to all that portion of the bed of the lake contained within the subdivision. That is to say, he takes as a riparian owner, his title includes, and he owns, the land beneath the lake far enough beyond the meander line and water's edge to make out the full subdivision in which his land is so situated.

But, even if there were any inconsistency in the several opinions of the Supreme Court of the State of Indiana, respecting the rights of riparian owners, and especially respecting the rights of the defendant in error in this case, in and to the property in controversy, we submit that this court, under its well settled rule, must follow the latest settled adjudication of the Supreme Court of the State in preference to the earlier ones.

There can be no question that the Supreme Court of Indiana expressly decided in this case, that the defendant in error owns, under the law of the State of Indiana, all of the property in controversy in this suit, as shown by the decree entered herein. The decision in this case is the latest expression of the Supreme Court of that State, and is in no sense *dictum*.

In *Wade* v. *Travis County*, 174 U. S., 499, this court held that:

> "If there be any inconsistency in the several opinions of a state court, the general rule is that this court will follow the latest settled adjudications, in preference to the earlier ones."

See, also,

Leffingwell v. *Warren*, 2 Black, 599.
Fairfield v. *Gallatin County*, 100 U. S., 47.

V.

IF THE COMMON LAW OF INDIANA WERE AS FOUND BY THIS COURT, IN HARDIN V. JORDAN, TO BE THE COMMON LAW OF ILLINOIS, THEN THE DEFENDANT IN ERROR, AS A RIPARIAN OWNER OF BORDERING LANDS, OWNS TO THE CENTER OF THE LAKES, AND, CONSEQUENTLY, ALL OF THE LAND IN CONTROVERSY.

For the sake of the argument, let us assume, contrary to the fact, that the survey made in 1834-35 of Township 37 North, Range 9, and Township 37 North, Range 10, did not include Wolf Lake and Lake George. Then we submit that, under the rule of the common law, as stated by this court in *Hardin* v. *Jordan*, defendant in error, as the owner of the land bordering on these lakes, would take to the center thereof.

The case of *Forsyth* v. *Smale et al.*, 7 Biss., 201, decided by Judge Drummond, sitting in the Circuit Court, for the District of Indiana, in May, 1876, was brought by one of the remote grantors of the defendant in error against John Smale, the husband of Sarah Smale, one of the plaintiffs in error in the case at bar. It was an action in ejectment respecting Lots 3 and 4, being the South half of Section 18, Township 37 N., R. 9, a part of the property in this suit. The decision was on the demurrer to the complaint, and, consequently, the question of whether or not the survey of 1834-35 had, as a matter of fact, been extended across Lake George was not gone into.

The court, however, decided that, in relation to a non-navigable lake, the law has always been that the purchaser takes the land to the center of the stream.

The court (p. 206 of the opinion), said:

> "We do not say but that circumstances might change the principle applicable to such a case as this, but if it be true, as we have the right to assume upon the pleadings that it may be or is, that the physical condition of this lake has not substantially changed between the time of the survey and the time when this suit was commenced, then it seems clear that the plaintiffs, in obtaining the titles to Lots 3 and 4, would have the right to include within the boundary of their land, as that which was sold by the government, all of the extension into the lake.
>
> Whether or not this was the effect of a gradual accretion upon the land, or of some sudden cause, all we can judge from is the facts as they appear from the pleadings. As this lake is only three-quarters of a mile wide, it may be doubtful whether the same rule ought to be applicable to this case as to a larger lake, which, owing to the cultivation of the country, or other cause, might dry up gradually or suddenly. For example: the plaintiffs, being the owners of all the lands on the east and west and southern boundaries of this lake

(*that is true of the defendant in error in the case at bar*), suppose that there is a gradual withdrawal of the lake, and the bed of the lake bordering upon plaintiffs' land should become dry land, what is to prevent the principle of accretion from operating in such a case as this, where the lake is only three-quarters of a mile wide? Ought there to be any difference in this case from that of a non-navigable stream, so-called? Is is not within the spirit of the acts of Congress? Whether that would be true of a large body of water, where the water gradually or suddenly retired, is not necessary to decide. It might be supposed in such case that the government did not intend to convey the land covered by the water, but that perhaps is not necessary to be decided in this case. Neither do I feel inclined to decide absolutely as to the rights of the parties in this case.

It may be that if the facts were all known to us, if the changes which had occurred since the time of the survey and the sale and the time when this suit was brought were known, we might take a different view of the case. But, as far as we can at present see, there seems to be no reason for taking this case out of the general rule, where land is purchased bordering upon a non-navigable stream, and where the line is meandered upon the stream for the purpose of quantity, and the stream is intended as the boundary of the land. The uniform rule as to the description of lands in deeds is that the great natural object is to govern, and courses and distances are to yield to the object. The great natural object here was the lake, or the water, and the plat shows that the western line of Lots 3 and 4 was intended to be the water, and we conclude that the government did not intend to exclude from the operation of the grant which was made to the purchaser any land between the meandered line and the water, so without actually deciding what may be the ultimate rights of the parties, we must hold that the demurrer is not well taken, and must be overruled."

This case was cited with approval in *Hardin* v. *Jordan*, *supra*.

Applying the common law rule, as indicated in *Forsyth* v. *Smale,* and in the Hardin case, and assuming that the defendant in error owns merely the land bordering on Lake George, and Wolf Lake, as shown by the maps printed herewith, then, under the decision in the above cases and the authorities therein cited, the defendant in error necessarily has title to all of the land claimed by plaintiffs in error in this controversy. A different holding would be wholly unsupported by authority, and would deprive defendant in error of its rights, as a riparian owner.

In the case of *Hardin* v. *Shedd,* reported as *Fuller* v. *Shedd,* in 161 Ill., 462, and now before this Honorable Court for reargument, as No. 56 on the calendar for the present term, involving the title to Wolf Lake, in Illinois, the Supreme Court of Illinois held, with respect to Wolf Lake, that the gradual recession of the waters of the lake has given the riparian proprietors the right to the new land by following the recession of the waters to their edge.

And in passing upon the question, the court said:

> "Where accretions come to such riparian proprietors, they shall take to the water's edge and follow the recession of the waters to their edge. Their lines and bounds are thus determined and are certain. This rule recognizes the riparian proprietor's rights to the fullest extent. The value of his riparian rights is preserved to him. If, as in many such lakes, there is much depth of water on one side, and very shallow on the other, and in process of time the recession of the waters on the shallow side passes beyond the lake's center, the owner on that side still goes to the water's edge, and the proprietor on the other side should not come in between the lake and such proprietor after the waters have receded beyond the center. Where there is depth of water, the lake still exists, and one proprietor is not deprived of the benefit of his riparian rights."

Thus we say that, in the case at bar, on the assumption

that the beds of Wolf Lake and Lake George were not included in the township survey of 1834-35, but that that survey covered only the land bordering those lakes, then, under the principles of the common law, held in the Hardin case, or, under the ruling of the Supreme Court of Illinois in *Fuller* v. *Shedd,* the defendant in error necessarily has title, as riparian owner, to the land here sought to be claimed by the plaintiffs in error. For, in any event, the defendant in error must be secured in its riparian rights.

We quote the language in *Hardin* v. *Jordan* (p. 381), as applicable:

> "It has never been held that the lands under water, in front of such grants, are reserved to the United States, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render the titles uncertain, and to derogate from the value of natural boundaries, like streams and bodies of waters."

VI.

LIMITATIONS.

Counsel for plaintiffs in error would impose upon this court the burden of examining the record to ascertain whether or not the defendant in error in the prosecution of this suit is barred by the Statute of Limitations of the State of Indiana. This was a question of *fact,* which has been decided adversely to the plaintiffs in error, both by the *nisi prius* and the Supreme Courts of the State of Indiana. (See opinion of Supreme Court of Indiana above quoted.)

If this court would go into the record to determine this question, its conclusion must necessarily, we submit, affirm that of the state courts. A jury was waived, the case tried

before the court, and the finding and judgment of the trial court having been affirmed by the State Supreme Court, the question as to whether or not the defendant in error complied with the Statute of Limitations of the State of Indiana cannot be here reviewed. It is not a Federal question.

Gardner v. *Bonestell,* 180 U. S., 362 (370).
River Bridge Co. v. *Kansas Pacific Ry. Co.,* 92 U. S., 315.
Dower v. *Richards,* 151 U. S., 658.
Egan v. *Hart,* 165 U. S., 188.
Hedrick v. *A., T. & S. F. R. R.,* 167 U. S., 673 (677).
Murdoch v. *City of Memphis,* 87 U. S., 590.

Conclusion.

For the convenience of the court, we hereto attach two maps. One is a copy of the original plat of the Government Survey of 1834-35, of Township 37 North, Range 10, and Township 37 North, Range 9, W., including Wolf Lake and Lake George, so far as applicable to this case. The second map is a copy of the foregoing with the uplands of the defendant in error abutting upon these two lakes, as originally conveyed, shaded, and the lines extended across the lakes in accordance with the findings of the Supreme Court of Indiana in *Kean* v. *Roby,* and in the case at bar.

In conclusion, we submit that the Supreme Court of Indiana has *found it to be a fact* that the beds of Wolf Lake and Lake George in Indiana were properly surveyed by the Federal government in 1834-35.

The United States, by patent, conveyed to the State of Indiana the lands in controversy, based upon the survey of 1834-35. In that conveyance the government made no reservations as to the portions of the property described in

the conveyance which were then or are now in the bed of Wolf Lake or of Lake George. This court, as well as the Supreme Court of Indiana, has held that, after the aforesaid conveyance by the Federal government to the State of Indiana, no further title remained in the United States, to be in any way disposed of, and that titles founded on the survey of 1875, under which plaintiffs in error claim, are absolutely void.

This court has repeatedly held that the decisions of the state court are final as to how far the title of a riparian owner extends.

It is the settled law of the State of Indiana that purchasers of the fractional lots or sections from the state, under the survey of 1834-35, took all of the land in said subdivisions, or lots, to the limits of such subdivisions. And this, irrespective of whether the land was or was not covered by water.

Even if there were a conflict in the decisions of the Supreme Court of Indiana on this subject, it is clear that the latest decisions of that court are to this effect, and must therefore govern.

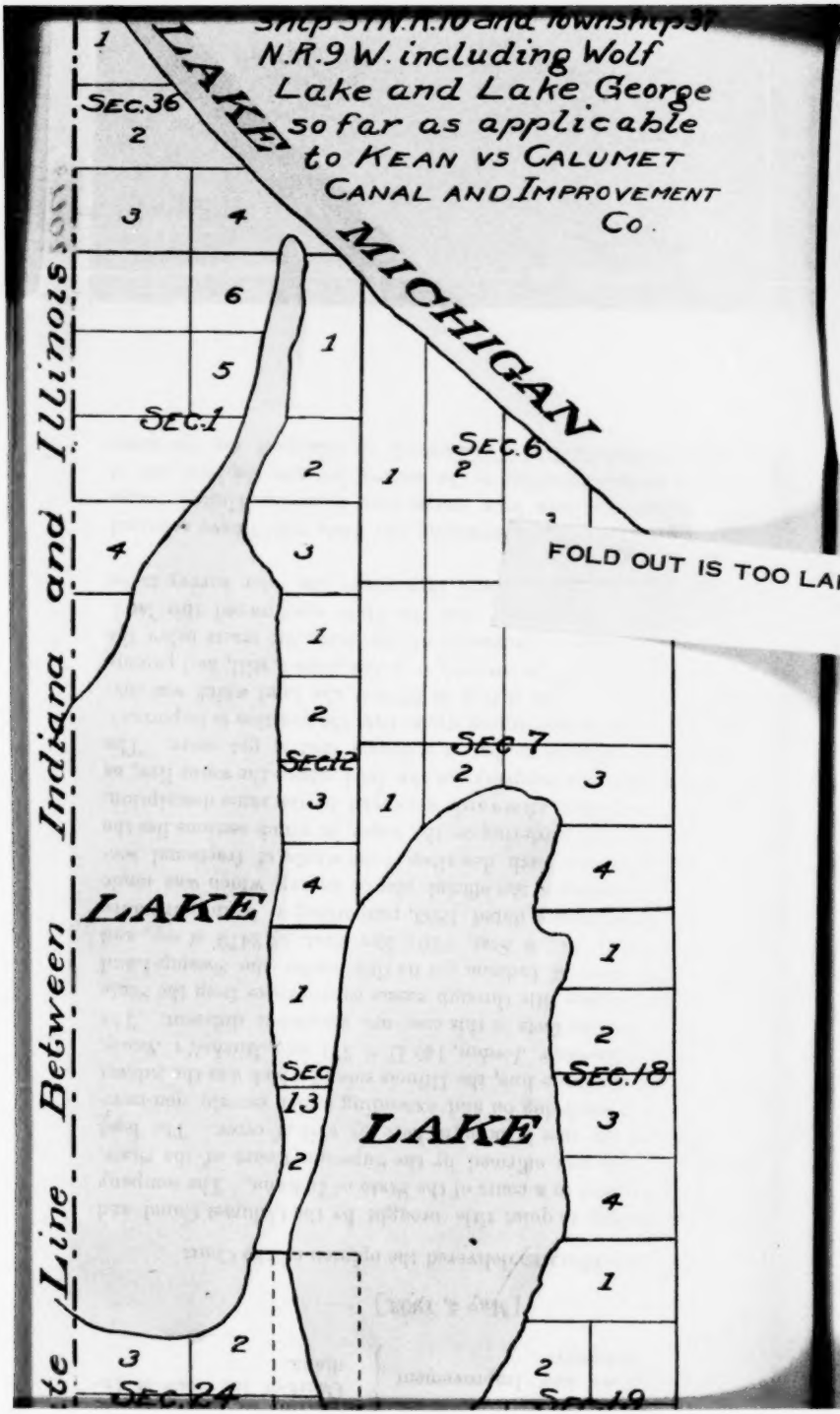
If the law of Indiana upon this proposition does not control, and the case must be decided in accordance with the common law, as laid down by this court in *Hardin* v. *Jordan*, then the defendant in error, as owner of the abutting land, holds the title to the center of the lakes, respectively, and to all the lands in controversy.

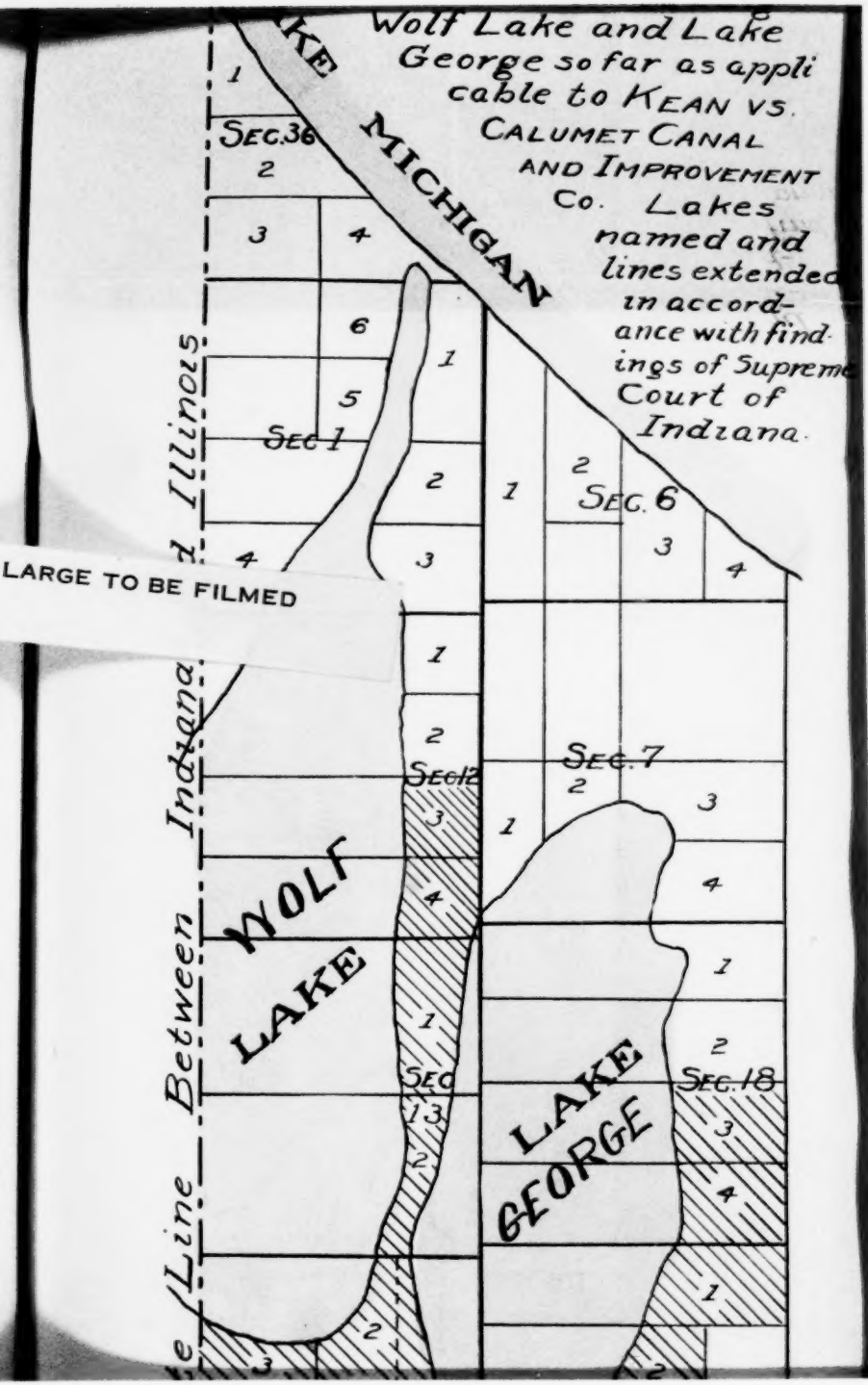
We therefore respectfully submit that the judgment of the Supreme Court of Indiana should, in all things, be affirmed.

FREDERICK S. WINSTON,

SILAS H. STRAWN,

Attorneys for Defendant in Error.


Township 31 N. R. 10 and Township 31 N. R. 9 W. including Wolf Lake and Lake George so far as applicable to KEAN vs CALUMET CANAL AND IMPROVEMENT Co.
LAKE MICHIGAN
Indiana and Illinois State Line Between
LAKE
LAKE
SEC. 36
SEC. 1
SEC. 6
SEC. 12
SEC. 7
SEC. 13
SEC. 18
SEC. 24
SEC. 19
FOLD OUT IS TOO LA


Wolf Lake and Lake George so far as applicable to KEAN VS. CALUMET CANAL AND IMPROVEMENT Co. Lakes named and lines extended in accordance with findings of Supreme Court of Indiana.
MICHIGAN
Illinois
Indiana
Between
Line
SEC. 36
SEC. 1
SEC. 6
SEC. 7
SEC. 12
SEC. 13
SEC. 18
WOLF LAKE
LAKE GEORGE
LARGE TO BE FILMED

Supreme Court of the United States.

No. 8.—October Term, 1902.

Annie R. Kean et al., Plaintiffs in Error, vs. The Calumet Canal and Improvement Company. } In error to the Supreme Court of the State of Indiana.

[May 4, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a proceeding to quiet title brought by the Calumet Canal and Improvement Company in a court of the State of Indiana. The company got judgment, which was affirmed by the Supreme Court of the State, 150 Ind. 699, and the case is brought here by writ of error. The land in question is land bordering on and extending under certain non-navigable water up to the State line, the Illinois side of which was the subject of the decisions in *Hardin* v. *Jordan*, 140 U. S. 371, and *Mitchell* v. *Smale*, 140 U. S. 406. But the facts in this case are somewhat different. The Calumet company claims title through mesne conveyances from the State of Indiana. The State of Indiana got its title under the Swamp-Land Act, Sept. 28, 1850, c. 84; 9 Stat. 520; Rev. Stat. §§ 2479 *et seq.*, and patents of the United States dated 1853, purporting to be in pursuance of that act, and referring to the official plat of survey, which was made in 1834. The patent set forth describes "the whole of fractional sections" enumerated and bordering on the water, in which sections lies the disputed land. The State afterwards conveyed by the same description. It is not denied that the company got the land above the water line, as shown in the plat referred to, but it is denied that it got more. The water has been receding and drying up, so that the question is important. The defendants set up a later survey in 1875 of the land which was covered by water in 1834, and is covered, to a less extent, still, and patents from the United States in pursuance of the same, for tracts below the original water line. They deny that the State ever owned this land, or, if it did, that it conveyed it, and they allege the later survey to be conclusive.

On general principles of conveyancing the State would have acquired the land in controversy here by a conveyance from the United States describing the upland according to the survey, because the local law of Indiana and the common law as understood by this court are the same,

so far as this case is concerned. *Stoner* v. *Rice*, 121 Ind. 51; *Hardin* v. *Jordan*, 140 U. S. 371. Th case is stronger if the land passed under the Swamp Land Act, as has been held by the State court with regard to this and similar patents. *Mason* v. *Calumet Canal & Improvement Co.*, 150 Ind. 699; *Kean* v. *Roby*, 145 Ind. 221; *Tolleston Club of Chicago* v. *Clough*, 146 Ind. 93; *Tolleston Club of Chicago* v. *State*, 141 Ind. 197. See *Mitchell* v. *Smale*, 140 U. S. 406, 414.

The making of a meander line has no certain significance. *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47, 52. It does not necessarily import that the tract on the other side of it is not surveyed or will not pass by a conveyance of the upland shown by the plat to border on the lake. It is not always a boundary. *Railroad Co.* v. *Schurmeir*, 7 Wall. 272; *Hardin* v. *Jordan*, 140 U. S. 371, 380; *Mitchell* v. *Smale*, 140 U. S. 406, 414; *Horne* v. *Smith*, 159 U. S. 40, 43; *Grand Rapids & Indiana Railroad* v. *Butler*, 159 U. S. 87, 93. In this case its immediate import was only to indicate the contour of the lake. It would seem, to be sure, that the settled understanding of the land department has been that in cases like the present the meander line marked the limit of the grant. But probably the cases are comparatively rare in which that understanding was acted on by an attempt subsequently to convey the land under water on the further side of the line at dates before the transactions with which we have to deal. The title to such land was not considered of much importance in the early days or worth the trouble of an independent survey. See *Newson* v. *Pryor*, 7 Wheat. 7, 11. The United States was more anxious for settlers than for revenue from that source. It is not necessary to consider how we should decide the case with our present light if the question were a new one. It is not new. For twelve years the decisions in *Hardin* v. *Jordan* and *Mitchell* v. *Smale* have stood as authoritative declarations of the law. Probably in most cases the statute of limitations has cured the defects of title which those cases may have shown. Mean time many titles must have passed on the faith of those decisions. The United States can meet them by the form of its conveyances. It seems to us that it would be likely to do more harm than good to allow them to be called in question now.

It is said that the land under water was not embraced in the survey of 1834. It would seem from the plat and the field notes that the sections and dividing lines were clearly marked off and posts set. The case is similar to *Kean* v. *Roby*, 145 Ind. 221, where the survey was pronounced sufficient. No difficulty was felt on the ground that the survey did not cover the submerged land in *Hardin* v. *Jordan*, 140 U. S. 371. But furthermore, the land was selected as "swamp and overflowed lands" by the State. It not appearing otherwise, the selection must be presumed to have included the land overflowed, and if so it was confirmed to the State

by the act of March 3, 1857, c. 117; 11 Stat. 251; Rev. Stat. § 2484. The confirmation encounters none of the difficulties of cases like *Stoneroad* v. *Stoneroad*, 158 U. S. 240. The land surrounding the water, at least, was surveyed, so that the identification of the submerged portion was absolute. We are of opinion that the State of Indiana got a title to the whole land in dispute.

If the State of Indiana got a title, it gave one. There is not much controversy on this point. We should follow the decision of the State court in this case so far as this question is concerned, if there was no other evidence of the State law. But the law of Indiana is shown by the other cases cited above to be clear on this point.

The resurvey by the United States in 1874 does not affect the Calumet company's rights. As the United States already had conveyed the lands, it had no jurisdiction to intermeddle with them in the form of a second survey. *Hardin* v. *Jordan*, 140 U. S. 371, 400; *Grand Rapids & Indiana Railroad Co.* v. *Butler*, 159 U. S. 87, 94, 95; *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, 289.

Of course, we shall not undertake to revise the finding of the State courts that the statute of limitations had not run in favor of the plaintiffs in error, and that, if any one is to profit by it, the Calumet company would prevail.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 8.—October Term, 1902.

Annie R. Kean et al., Plaintiffs in Error,
vs.
The Calumet Canal and Improvement Company.

In error to the Supreme Court of the State of Indiana.

[May 4, 1903.]

Mr. Justice White, with whom concurs Mr. Justice McKenna, dissenting.

The importance of the question which this cause involves and the far reaching and injurious consequences which, in my opinion, must arise from the continued application of what seems to me to be the erroneous theories upon which it is now decided, not only constrain me to dissent, but cause me to state fully the reasons by which I am controlled.

The controversy is between opposing claimants to lands once a part of the beds of certain non-navigable bodies of waters, styled lakes—and which shall be hereafter referred to by such designation. Both parties asserted title under patents of the United States.

In 1834 surveys were made by the United States of townships 37 north, in ranges 9 and 10 west, second principal meridian, lying in Lake County, in the extreme northwestern portion of the State of Indiana. Township 37 in range 9 was bounded on the west by township 37 in range 10, and the latter was bounded on the west by the State of Illinois. From the eastern boundary of township 37 in range 10 there was less than a mile intervening to the Illinois boundary on the west. In consequence, the sections or fractional sections appearing on the plat of survey of that township were only the extreme easterly tier of sections, being those numbered 1, 12, 13, 24, 25 and 36. A copy of a portion of the government plat of survey of the townships named, in which are embraced the lands whose title is in dispute, is here inserted for convenience of reference.

LAKE MICHIGAN
State Line ....between Indiana and Illinois
2500
14400
1
3960
5960
80
2
Sec 12
18148
3860
Sec 7
3
1
2770
50380
3
3800
4605
6585
3700
1825
2000
4
61.604
3500
LAKE
1
4930
1
6510
2
5060
Sec 13
8080
Sec 18
19460
2
4820
3
3580
LAKE
4620
4
500
1836
2250
1
54.00
2
347.70
6860
2
3640
40
Sec 24
37116
Sec 19
38394
1
5390
30
3
80
5396
40
2000
2100
4
2954
6600
1555
Range 10.
Range 9.

The easterly of the two bodies of water, lying partly in both townships, is known as Lake George or Mud Lake. The westerly body is called Wolf Lake. As shown by the plat, the lines of survey were not actually run across the water of the lakes, and, consequently, no attempt was made to subdivide the lands in the then beds of the lakes into legal subdivisions. The lines of survey were in fact run around the rim of each lake, and the fractional lots resulting from the meander line were given numbers, as was customary in such cases.

The land about the margin of the lakes was very flat, and the average depth of water at the time of the surveys was conjectured to be about five or six feet.

None of the fractional lots abutting on the two lakes in the townships in question had been disposed of by the United States prior to the passage of the swamp land act of September 28, 1850. Thereafter, the State of Indiana transmitted a list of lands which it desired should be patented to the State under said act, and the list embraced the portions of the townships in which Wolf Lake and Lake George were situated. This list, however, referred only to entire sections, took no note of the plat of survey and made no reference to the fractional lots abutting on the lakes or the other subdivisions of sections. In the approved list of selections made by the Secretary of the Interior the general description of the lands as given in the State lists was followed, except that where by the meander line shown on the plat of survey it appeared that a section was made fractional, the section was termed a fractional section, and the quantity of land shown on the plat to be contained in each minor subdivision or fractional section was specifically stated.

A patent dated March 24, 1853, was issued to the State of Indiana for the approved selections. The mode in which the lands were described in the patent is illustrated in the following excerpt:

"Also, the whole of fractional sections one, twelve, thirteen and twenty-four, the north half of the southeast quarter, the southeast quarter of the southeast quarter and the northeast quarter of section twenty-five and the whole of fractional section thirty-six, all one thousand seven hundred and ninety-one acres and sixty-hundreths of an acre. . . ."

After the description of the lands was the following:

"According to the official plats of survey of the said lands returned to the General Land Office by the surveyor general."

Soon after acquiring title in this manner to the border lots, the State of Indiana conveyed them, by the plat numbers, to private individuals.

While the record does not show the causes which led to the drying up of the beds of the two lakes within the meander lines on the plats of surveys of 1834, it is nevertheless certain that about the year 1874 the

waters of these lakes had in great part disappeared. In the years 1874 and 1875 various persons settled on the uncovered lands referred to, with the intent of acquiring title under the homestead law. Application was made to the Interior Department for a survey thereof. In virtue of this application, a survey was made in 1875—known as the Walcott survey—and a plat was drawn exhibiting the subdivisions thereof. The confirmation of this survey was resisted in the Land Department by one who had acquired title to border lots from the State of Indiana, on the ground that the United States had no land to survey in the beds of the lakes, as the effect of the conveyance by the United States to the State had been to pass title to the beds of the lakes. This controversy before the Land Department was finally disposed of on February 23, 1877, by the Secretary of the Interior, in favor of the validity of the Walcott survey. Thereafter patents for the lands in the beds of the lakes covered by the survey were issued by the United States.

In 1895, the Calumet Canal and Improvement Company brought an action in the Lake Circuit Court of Indiana, to quiet its asserted title to certain of these border lots and its alleged title as riparian owner to land in front thereof, once part of the beds of the lakes, and, upon a second trial of the action, obtained judgment. On appeal, the Supreme Court of Indiana affirmed the judgment, and the cause was then brought to this court on a writ of error prosecuted by claimants under the Wolcott survey, based upon the contention that the decision of the Supreme Court of Indiana was against a title and right specially set up "under the statutes, patents, deed of conveyance and authority of the United States of America." In deciding against the validity of the Wolcott survey and the patents to land in the beds of the lakes based on such survey the Supreme Court of Indiana said (p.):

"In 1875 certain persons, under the assumption that the beds of the lakes had not been surveyed in 1834, procured a resurvey of that part of the lands formerly covered by the waters, and it is through this last survey, and the sales made in pursuance thereof, that appellants claim title. The case before us, therefore, in so far as concerns source of title, does not differ from that of *Kean* v. *Roby*, (145 Ind. 221.) On the authority of the decision in that case, there can be no question that the resurvey of 1875, as also the sales made thereunder, were wholly invalid, and consequently that appellee's title, as based upon the original survey of 1834, and the sales made under that survey, is good. No real distinction in this regard has been shown between the two cases."

It becomes necessary, therefore, to refer to the case of *Kean* v. *Roby*, upon which the Supreme Court of Indiana rested its conclusion. As, moreover, the comprehension of the doctrines involved in that case necessitates a

consideration of the course of previous decisions in Indiana relative to the subject involved, I shall review the Indiana cases preceding *Kean* v. *Roby*, in order, as far as may be, to an exact elucidation of the legal principles by which the decision of this case was below controlled.

Ross v. *Faust*, (1876) 54 Ind. 471, involved the title to land under the bed of a non-navigable river. The land abutting on the stream had been surveyed and the stream had been meandered. The question was whether patents of the United States conveyed land under water within the meander lines. Determining the construction of the patent solely by reference to the laws of the United States, the court decided that, as the stream was in fact non-navigable, the holder of the patent to the border lots had title to the center of the stream despite the meander line.

Ridgway v. *Ludlow*, (1877) 58 Ind. 248, involved a controversy respecting the ownership of land once forming part of the bed of a non-navigable lake. The land bordering on the lake had evidently been acquired from the United States and the lake had been meandered. The rule in *Ross* v. *Faust* was appplied, the court saying:

"We can see no difference in principle in this rule, whether applied to non-navigable rivers or non-navigable lakes, when they are within the Congressional survey."

Edwards v. *Ogle*, (1881) 76 Ind. 302, presented the following state of facts: On a plat of survey of a section of land, which was in great part covered by the waters of a pond, the banks of the pond were shown as meandered, but the lines of the sections, half sections and quarter sections were extended across the pond by dotted lines. A fractional portion of the southwest quarter, represented as containing 39 acres—the dry land outside of the meander—was patented by the United States in 1845. In 1851 the United States, under the swamp land act, executed to the State of Indiana a patent for the east half of the southwest quarter, being within the meander line. In 1858 the United States issued a patent to one Ogle for the west half of the same quarter section. Edwards, as owner of the thirty-nine acre tract, asserted a right to the center of the pond, which if allowed would have absorbed the land claimed by Ogle. Edwards was confined to the actual quantity of land specified in the patent. *Ross* v. *Faust* was distinguished, the court remarking of that case: "The bed of the river had not been surveyed as a part of the public domain, but, on the theory that White River was a navigable stream, the government surveys had been terminated at the margin thereof."

State v. *Portsmouth Savings Bank*, (1886) 106 Ind. 459, involved the question whether conveyances of fractional lots bordering on Beaver Lake, in Newton County, Indiana, passed title to land under the bed of the lake. The controversy was between the State claiming the bed of the lake and

certain private individuals who deraigned title from the State, claiming that as the State had transferred to them rights derived under patents from the United States, their rights were coterminous with the patent and extended across a meander line to the center of the lake. Beaver Lake was a body of water covering about seventeen thousand acres of land, and averaging from five to seven miles in length and from two to four miles in width. The border lands had been surveyed in 1835 by authority of the United States, and were subject to private entry. In making the survey the same was extended around the lake and a meandering line established. As a necessary result of the meander line fractional lots were shown on the plat around the margin of the lake. Under the swamp land act the border lands, by the government subdivisions, were selected by the Secretary of the Interior and patented to the State of Indiana.

The Supreme Court of Indiana declared that it was not necessary "to determine whether the patents of the United States to the State for the fractional lots bordering upon and surrounding the lake, being grants from one government to another, by their own force carried the bed of the lake." Reviewing previous decisions of this court, construing the swamp land act, the Indiana court held that that act was a grant *in præsenti*. It was further held that, although the bed of Beaver Lake was not embraced in the list of selections made by the State, yet by the acts of its officials, immediately after the grant to it of the border lands, the State had treated the bed of the lake as swamp and overflowed land, and constructively selected the same, and that an act of Congress, approved January 14, 1873, (17 Stat. 409,) releasing and quitclaiming the bed of Beaver Lake to the State of Indiana, did not operate as a grant, but simply as a confirmation of the prior selection, thereby perfecting the title as indefeasible.

The court came next to consider the claims of the grantees of the State of border lots, described in the patent from the State according to the plat of survey which had been made by the United States. It was declared that State patents for border lots must be construed with reference to the power conferred upon State officials by the State law, and not by the rules which would govern a conveyance by a private individual; and, applying this rule, it was held that the patents for border lots carried to the grantees "no more of the swamp and overflowed lands than were included in the several surveyed subdivisions *bounded by the lake*."

Stoner v. *Rice*, (1889) 121 Ind. 151, was a controversy between owners of border lots as a meandered non-navigable lake claiming under patents of the United States and patentees of the United States under a subsequent survey of the bed of the lake. Despite its previous ruling in *Ridgway* v. *Ludlow*, *supra*, it was now held that the rule giving a riparian

owner of fractional lots abutting on a meader line title to the thread or center of the stream, was not applicable. The case was decided upon what the court assumed to be the law of the United States governing surveys of the public domain, the court said (p.):

"The true doctrine to apply, in the disposition of such land as is covered by the body of such lakes, we think is that the government in making surveys included in such survey all the land within the district surveyed, and if there was a lake or large pond, which covered a part of a subdivision, it was meandered out, and the dry land in such subdivision designated as a fractional subdivision or lot; that in the purchase of such fractional subdivision or lot the purchaser took title to it as a riparian owner, with the right to the land, as the water receded, within the boundary lines of the subdivision conveyed to the purchaser. In other words, the purchaser acquired title to all the land within the subdivision, though it was described as a fractional subdivision or lot. The authorized survey divided all the land within the district into subdivisions, and if, by reason of water upon a tract of land, a portion of it was regarded at the time as worthless and unsalable, there was a meander line run to ascertain the amount of dry land, and such subdivision was designated as fractional subdivision or lot, and, although thus described, the sale passed title to the whole subdivision."

The court declared that the doctrine thus announced by it was not in conflict with its previous ruling in *Edwards* v. *Ogle*.

Brophy v. *Richeson*, (1894) 137 Ind. 114, was a contest between the patentees of a fractional tract of dry land termed the southeast fractional quarter of a certain section, lying north and east of a meandered lake, and the patentees under a later survey made by the United States of the bed of the lake. It was held—following *Stoner* v. *Rice*—that the claimant under the first patent took title to all the land within the quarter section, whether dry or covered by the waters of the lake.

Tolleston Club v. *State*, (1894) 141 Ind, 197, was an action brought by the State of Indiana for the recovery of lands within the meander lines of a United States survey. The claim was that the State had acquired title to the lands within the meander upon selections made under the swamp land act of certain land, for which patents of the United States had been issued to the State of Indiana in 1853. Although the State had conveyed the border lots which she had acquired from the United States, the theory of the claim of the State was that, despite this conveyance, she remained the owner of and was entitled to recover the land within the meander, because it was deemed, in accordance with the ruling in the Portsmouth Bank case, (involving Beaver Lake,) that the State, in transferring the border lots, by their designation on the government plat of survey, had retained to herself and not conveyed her title to the land under water. The defendants asserted title derived from the United States under patents

issued subsequent to 1870, based upon a survey made of the bed of the water by reason of an act of Congress, which is excerpted in the margin.*

It suffices to remark that it was held that, although the United States survey showed a meander line and fractional lots or sections thereon, that this meander line, under the laws of the United States, was not a boundary, because, under said laws, its sole purpose was, not to limit the survey in any way, but simply to indicate how much dry land there was in the subdivision purchased. Consequently, it was determined that the land, both dry and wet, should be treated as having been wholly surveyed, because the lines of survey might be protracted across the meander so as to make complete surveyed sections, embracing both the dry and the wet land. The enumeration in the plat of the quantity of land contained in the subdivisions of the sections was considered as immaterial, and the doctrine of *Stoner* v. *Rice* was applied.

Whilst the claims of the patentees under the subsequent United States survey of the land within the meander was therefore rejected, and the act of Congress directing the survey was decided to be void, it was yet held that, as the State must recover upon the strength of her own title, she was not entitled to judgment for any land within the meander lines, because the grants made by the State of the fractional lots passed title to the legal subdivision beyond the meander lines, upon the theory of survey above noticed and the controlling effect of the decision in *Stoner* v. *Rice*. A petition for rehearing was filed on behalf of the State. An opinion denying such rehearing is reported in 141 Ind. 197. The principal contention on behalf of

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*Act approved July 1, 1870 (16 Stat. 187.)

Chap. CXCIX.—An act in relation to certain unsold lands in the counties of Porter and Lake, in the State of Indiana.

Whereas, there is lying along the Little Calumet River, in the counties of Porter and Lake, in the State of Indiana, a body of lands supposed to contain about four thousand acres, which has never been sold or surveyed, and which was described in the original government surveys as impassable morass; and whereas the Calumet Drainage Company has been organized under the laws of said State, for the purpose of draining the valley of said river, including said morass: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said unsold lands shall be subject to a lien under the laws of the State of Indiana for its proper proportion of the cost of such drainage, and such lien may be enforced against said lands in the same manner and to the same extent as if the said lands were owned by private persons: *Provided*, That no claim shall be held to exist against the United States for such drainage.

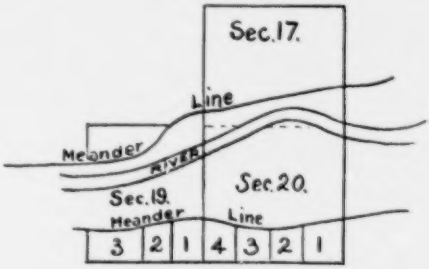
SEC. 2. *And be it further enacted*, That said lands may be surveyed and sold to the highest bidder, under the directions of the Secretary of the Interior, subject to said lien.

the State was that "the court erred in holding that the land in controversy had been surveyed either by the government of the United States, or by the State of Indiana, at the time of the sale of such border lots by the State." The court, however, observing that this contention was dangerous ground for the State to stand upon, considered at length the provisions of sections 2395 and 2396 of the Revised Statutes of the United States, and concluded as follows:

"The land in controversy was therefore surveyed into sections, as provided by law, by the United States government surveyors, in 1834. But, even if we were mistaken in this, it would, as we have said, be a dangerous contention for appellee to undertake to show that such survey was not made. The swamp land act of 1850, under which the State claims title, requires that the lands should be selected, and the selections approved by the Secretary of the Interior, as swamp lands. The land in dispute consists of parts of surveyed sections of land, selected, approved and certified from the General Land Office of the United States. The land so selected is described as in township No. 36, range 8 west, and being 'all of . . . [sections] 12, 15, 17, 18, 19 and 20. All of 21 and 22 [and] N. W. ¼ 23.' But, if there were in fact no survey, then no such sections would exist, at least between the meanders of the Calumet River; and so no selections would ever have been made by the State, or approved by the Secretary of the Interior. The consequence would be that the State had never received title, and the unsurveyed lands, having remained in possession of the general government, were correctly surveyed, and sold under the act of Congress of 1870. If, therefore, we should admit this main contention of counsel for appellee, the consequence would inevitably follow that the State had never acquired title to the land in dispute. We are satisfied, however, that the conclusions reached in the original opinion—that the lands were surveyed in 1834; that they were selected, and the selections approved, under the swamp land act of 1850; that the State therefore acquired good title under that act; and that the act of 1870, with the resurvey and sales thereunder, was a nullity—are all correct; and we are quite unable to understand why counsel should here insist upon a contention which, if agreed to, would cut the ground entirely from under their own feet."

The Portsmouth Savings Bank case was distinguished by the statement that "Beaver Lake was a large body of water, of shallow depth, which had not been surveyed by the United States government."

The precise import of the doctrine which, following *Stoner* v. *Rice*, the court applied in the case just reviewed is so aptly portrayed in the case of *Tolleston Club* v. *Clough*, (146 Ind. 93,) that it is here noticed out of its chronological order. The plaintiff commenced his action to quiet title to land derived from the State through patents issued to the State by the United States under the swamp land act. The lands in controversy were part of those which were involved in the case of *Tolleston Club* v. *State*, *supra*. The exact situation of the lands is shown on the following plat which is reproduced from the opinion of the Supreme Court of Indiana:



To convey a clear conception of the situation and character of the land, a passage is here excerpted from the opinion in *Tolleston Club* v. *State*, *ub. sup.*:

"The lands claimed by the State are within the meander lines of the United States survey, on each side of the Little Calumet River, being a tract about six miles in length, and from about three-quarters of a mile to about a mile and a quarter in width. In the original field notes of the survey the region is referred to as a 'lake,' while on the plat it is marked 'Impassable Marsh.' At the time of the United States survey in 1834 the territory was completely covered with water, in which, outside the river proper, there was a heavy growth of cattails, wild rice, and other swamp-like products."

The plaintiff, deriving title from the patents of the United States covering the fractional lots outside of the meander line, claimed to be the owner of the marsh land inside of the meander up to the thread of the stream marked on the plat as a river.

The court followed its ruling in *Tolleston Club* v. *State*, and said:

"It is plain that the lots described, being lot one and parts of lots two and three, in section 19, and lots one, two, three and four in section 20, all extend north to the north section lines of their respective sections."

By this ruling the lots abutting on the meander were made to cross that line, embrace the marsh land lying between them and the river, and would have extended across the river, so as to include practically the entire river in those sections, except where in the sinuosity of the river it crossed the section line. As, however, the court found that the owner of the lots abutting on the meander had only claimed to the bed of the river, it limited his rights in consequence of the pleadings to that extent, thus preventing the acquisition of the entire section where the section line was beyond the bed of the river.

I now come to the case of *Kean* v. *Roby*, (1896) 145 Ind. 221, upon the authority of which case the Supreme Court of Indiana affirmed the judgment of the trial court in the case at bar. *Kean* v. *Roby* was an action

brought by the owner of lands abutting on Wolf Lake, to quiet her title to land once part of the bed of the lake. The plaintiff claimed title to the border lots as well as to the lake bed land by virtue of the survey made in 1834 and a patent from the United States to the State, made in 1853, under the swamp land act. The defendants claimed title under patents, based upon the Wolcott survey of 1875, of lands once part of the bed of the lake. Despite the fact that on the plat of survey the lake was meandered and there were no sectional corners to which the lines could be protracted, the court held that the case was covered by the Tolleston Club decision, because it was deemed that the field notes showed that it would be possible to protract the lines so as to make regular and complete sections, and it was therefore held that the owner of the border lots was entitled to the adjacent land under water as well.

It therefore results that the doctrine embodied in the case of *Kean* v. *Roby*, and the previous cases commencing with *Stoner* v. *Rice*, was the rule applied in the decision of the case now under review, and by which the beds of the lakes were given to the owner of the border lots.

All the cases which have been recapitulated, I submit, divide themselves into two classes, the first, those prior to *Stoner* v. *Rice;* the second, the case of *Stoner* v. *Rice*, and those subsequent to it, including the ruling therein made. Without pausing to ascertain whether the cases in the first class are reconcilable with each other, or those in the second class can be made to harmonize with those in the first, one thing it seems to me is apparent: that is, that all the cases in both the classes, including the decision in the case at bar, indubitably held—

1. That the government of the United States owned the soil under all bodies of non-navigable water lying within the public domain of the United States, and that the title thereto remained in the United States until it had parted with it pursuant to the laws of the United States; and

2. That in determining whether the United States had parted with title to such lands the Indiana court always decided that question, not upon the controlling effect of any supposed rule of State or local law, but by what it deemed to be the proper construction of the laws of the United States governing the survey and disposition of the public domain.

The right of the defendants under patents of the United States, which they specially set up, having been denied, because it was conceived by the court below that no title vested in them under the laws of the United States, it would seem that the question arising for decision is this: Did the court correctly interpret the statutes of the United States?

This is a Federal question. But it is pressed that what title to the beds of the lakes passed to the State from the United States, either under the swamp land act or in virtue of the patents issued to the State, is to be

determined, not by the law of the United States but solely by the State or local law; hence it is insisted the case must be decided by the law which is rightfully applicable to it and not by the law of the United States, which the Supreme Court of Indiana erroneously deemed was essential to its decision. If I entertained the opinion that the State or local law governed, and in consequence that this case was to be disposed of by considerations inherently local, I would, of course, be obliged to conclude that the controversy must be judged by that law which properly controlled it and not by the law of the United States, which was mistakenly applied by the lower court. In that view my mind would be driven to the conclusion that this case should be dismissed for want of jurisdiction, since here there is no authority to review the action of the State court in a cause inherently depending upon the State or local law. Nor would this result be changed because the defendants asserted rights to the beds of the lakes under patents of the United States issued subsequent to those relied upon by the plaintiff, as its ultimate source of title. This follows, since the claim of the plaintiff was that title had passed to it and out of the United States by the swamp land act or the patents issued prior to those upon which the defendants relied. Now, if the question whether the land claimed by both parties had passed to the plaintiff or its grantors, prior to the issue of the patents to the defendants, is to be determined solely by the State or local law, it would follow that a decision of the State court in favor of the right of the plaintiff involved only a conclusion of State or local law broad enough to sustain the judgment, wholly irrespective of the Federal rights asserted by the defendants, and also entirely without reference to the soundness of the reasoning by which the court had reached its all-sufficient and non-Federal conclusion. Before therefore coming to consider the correctness of the ruling of the State court concerning the United States law which that court deemed to be decisive, it becomes necessary for me to ascertain whether, as asserted, the question as to the extent of the title derived from the United States by the plaintiff or its grantors is to be determined by the State or local law.

The issue which first arises then is, by what law is the quantity of land which passed to the State under the statutes of the United States and its patents to be determined, by the law of the United States which conferred on the State whatever rights it acquired or solely by the State or local law, which had no agency or influence in passing rights from the United States to the State? In solving this question it is at once conceded that there are two cases—decided by this court on the same day, one resting upon the other, and therefore virtually but one case—announcing the doctrine that where the United States has conveyed land bordering on the meander line of a non-navigable body of water the question of what rights

.n the land under water passed from the United States to its grantee is to be determined solely by the State or local law.

The cases referred to are *Hardin* v. *Jordan* and *Mitchell* v. *Smale*, reported respectively in 140 U. S. 371 and 406. Both cases were actions of ejectment, and the judgments reviewed were rendered by the Circuit Court of the United States for the Northern District of Illinois. The plaintiff in each case was the owner, by mesne conveyances, under patents of the United States, based upon surveys made in 1834 of fractional lots abutting on the portion of Wolf Lake situated in the State of Illinois, and they claimed as such abutting owners title to land once forming part of the bed of the lake. The defendants asserted title to the lake bed lands upon the survey made in 1874 by the United States, and patents issued to them founded upon such survey. The trial court had held that the title of the owners of the border lots extended only to low water mark and found in favor of the defendants as to the land under water. The ground upon which the decision of the court reversing the trial court in both cases was based is shown in the following excerpts from the opinion in *Hardin* v. *Jordan*, pages 379, 380, 381 and 384:

"The government surveys made in 1834–35, upon which the patent was issued, not only laid down a meander line next to the lake, but also described said lines as running 'along the margin of the lake;' and the plat of the survey, returned to the general and local land offices, and referred to in the patent for identification of the land granted, exhibited the granted tracts as actually bordering upon the lake; and the lake itself on said plat was marked with the words 'Navigable lake,' although the fact found by the court is that the lake was not and is not a navigable lake, but a non-navigable fresh water lake or pond. The patent itself does not contain all the particulars of the survey, but the grant of the lands is recited to be according to the official plat of the survey of said lands, returned to the General Land Office by the surveyor general, thereby adopting the plat as a part of the instrument.

* * * * * *

"It has never been held that the lands under water, in front of such grants, are reserved to the United States, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain, and to derogate from the value of natural boundaries, like streams and bodies of waters.

* * * * * *

"Such being the form of the title granted by the United States to the plaintiff's ancestor, the question is as to the effect of that title in reference to the lake and the bed of the lake in front of the lands actually described in the grant. This question must be decided by some rule of law, and no rule of law can be resorted to for the purpose except the local law of the State of Illinois.

* * * * * *

"It has been the practice of the government, from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines.

* * * * * *

"We do not think it necessary to discuss this point further. In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie."

What was the law of Illinois with regard to such grants was next considered, and it was determined "that the law of Illinois in this regard is the common law, and nothing else," and that the title of the owners of border lots on a non-navigable body of water extended to the middle of the water.

If the doctrine announced in the cases referred to is to be here applied, then, as I have said, there is an end to this case and the writ should be dismissed for want of jurisdiction, since in that view there is no substantial Federal contention in this record, for the reason, as I have previously remarked, that the decision of the State question would be broad enough to sustain the judgment without reference to the Federal rights asserted by the defendants. The doctrine, however, of *Hardin* v. *Jordan*, as it is given me to understand it, is not only unsound in reason but incompatible with many cases decided in this court prior to and since its announcement, and besides is in conflict with the legislation of Congress and the practice of the government from the beginning. Impressed with the correctness of these views, and entertaining the conviction that the enforcement of the doctrine will lead to the gravest consequences in the future, it is proposed to consider its correctness as an original question, before agreeing that its application in the case at bar is proper. If the result of my investigation be the conclusion that the State or local law should not be applied, contrary to the ruling in *Hardin* v. *Jordan*, I shall then proceed to ascertain what are the rights of the parties, when measured by the law of the United States. If that investigation develops that the court below erroneously interpreted the law of the United States, and therefore wrongfully denied the title of the plaintiffs in error, it will be left for me to consider whether it is my duty, under the principle of *stare decisis*, to give my assent to the legal wrong which, under the views stated, was below committed.

It is unnecessary to elaborately demonstrate the elementary proposition that the United States, under the Articles of Confederation, was the owner of the public domain, however acquired, and that, since the adoption of

the Constitution, the United States had also possessed, in full proprietorship, the public domain, from whatever source its title has been derived. The doctrine on the subject was summarized by Chancellor Kent (Com. vol. 1, p. 267) in the following language:

"Upon the doctrine of the court in *Johnson* v. *McIntosh*, (1823) 8 Wheat. 543, and *Fletcher* v. *Peck*, (1810) 6 Cranch, 142, 143, the United States own the soil as well as the jurisdiction of the immense tracts of unpatented lands included within their territories, and of all the productive funds which those lands may hereafter create. The title is in the United States by the treaty of peace with Great Britain, and by subsequent cessions from France and Spain, and by cessions from the individual States."

The matter was aptly epitomized in *Irvine* v. *Marshall*, (1858) 20 How. 556, where it was said (p. 561):

"It cannot be denied, that all the lands in the Territories, not appropriated by competent authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles, as the Government may deem most advantageous to the public fisc, or in other respects most politic."

It is also elementary that land covered by water within the public domain of the United States is as much a part thereof as the dry land. Thus, in *Illinois Central R. R. Co.* v. *City of Chicago*, (1900) 176 U. S. 646, speaking through Mr. Justice Brown, it was said:

"We do not question the general principle that the word 'lands' includes everything which the land carries or which stands upon it, whether it be natural timber, artificial structures, or water, and that an ordinary grant of land by metes and bounds carries all pools and ponds, non-navigable rivers, and waters of every description by which such lands, or any portion of them, may be submerged, since, as was said by the court in *Queen* v. *Leeds & L. Canal Co.*, (7 Ad. & El. 671, 685): 'Lands are not the less land for being covered with water.'"

But whilst the ownership of the United States, under the Confederation and under the Constitution, both of the dry land and that covered with water in the public domain, cannot be controverted, from the beginning it was conceded that the ownership of the public domain did not carry with it navigable waters or the land constituting the beds thereof, as such waters were considered within the class of public waters to be forever devoted to the public use. This was recognized by a provision of the ordinance of 1787 for the government of the Northwest Territory, as follows:

"The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost or duty therefor."

And, early in the history of Congress, prior to the adoption in 1805 of a general system for the survey of the whole public domain of the United States, the same principle was expressed in the act of May 16, 1796, (1 Stat. 464,) the ninth section of which act was as follows:

"SEC. 9. *And be it further enacted*, That all navigable rivers within the territory to be disposed of by virtue of this act shall be deemed to be and remain public highways. And that in all cases where the opposite banks of any stream, not navigable, shall belong to different persons the stream and the bed thereof shall become common to both."

And because navigable waters were thus from the beginning recognized as public highways and have ever since then been treated as sacredly devoted to the public use, they were always in principle excluded from the sales of the public domain. But the contrary rule has from the beginning prevailed as respected non-navigable waters, which have always been surveyed and sold and paid for. I shall take occasion hereafter in reviewing the legislation of Congress to demonstrate this fact, and therefore to point out that the statement to the contrary in the passage from the opinion in *Hardin* v. *Jordan*, which I have already quoted, must have been the result of confounding the general practice not to sell public waters with the universal practice to survey and sell non-navigable or private waters. No better illustration of the truth of this statement is required than is shown by this case, where the United States sold and surveyed the beds of the non-navigable waters to the defendants below long after the grant of the border lots; and the same condition of things is evidenced by other of the Indiana cases which have been reviewed, and it is to be observed that in two of the cases the grant or direction to sell the land covered by non-navigable waters was made by special acts of Congress long after the border lots had been disposed of.

Doubtless as the result of the provisions treating navigable waters as public highways and from a consideration of the nature and extent of the powers vested by the Constitution in the Federal government and those reserved to the States, and by a consideration of the doctrine of public and private waters known to the common law, it was early decided and has been repeatedly reiterated that the navigable waters and the land under them belonged to the States—as well the new as the old—in virtue of their sovereignty, to be held in trust for their people subject to the power of Congress to regulate commerce. And in harmony with the principle just stated, it has been decided that such navigable waters and the land under them in the public domain of the United States within the territories, while subject to be disposed of by Congress, under the trust for public use, were yet held by the United States to be transmitted to the new States to be formed, and which should, when endowed with statehood, possess them with the same rights and powers as the

original States. A list of the cases in which this doctrine is stated is appended in the margin.*

The doctrine of the cases was clearly stated in the opinion delivered by Mr. Justice Field, speaking for the court, in *Illinois Central R.Co.* v. *Illinois*, (146 U. S. 387, 435,) where it was said:

"It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. (*Pollard's Lessee* v. *Hagan*, 3 How. 212; *Weber* v. *Harbor Commissioners*, 18 Wall. 57.)

"The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes, over which is conducted an extended commerce with different States and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes."

And as a necessary consequence of the ownership by the States, in trust, of the navigable waters and the land under them within their territorial jurisdiction, it came to be decided that rights in and incident to such navigable waters or the land under them were to be determined solely with reference to the law of the State in which such navigable waters were situated. *Barney* v. *Keokuk*, (1876) 94 U. S. 324; *St. Louis* v. *Myers*, (1885) 113 U. S. 566; *Packer* v. *Bird*, (1891) 137 U. S. 669, 690; *St.*

*Martin *v.* Waddell, (1842) 16 Pet. 367, 410; Pollard *v.* Hagan, (1845) 3 How. 213; Goodtitle *v.* Kibbe, (1850) 9 How. 471; Doe *v.* Beebe, (1851) 13 How. 25; United States *v.* Pachecho, (1864) 2 Wall. 587; Mumford *v.* Wardwell, (1867) 6 Wall. 423; Smith *v.* Maryland, (1855) 18 How. 74; Weber *v.* State Harbor Commissioners, (1873) 18 Wall. 57; Barney *v.* Keokuk, (1876) 94 U. S. 324; McCready *v.* Virginia, (1877) 94 U. S. 391; St. Louis *v.* Myers, (1885) 113 U. S. 566; Manchester *v.* Massachusetts, (1891) 139 U. S. 240; Packer *v.* Bird, (1891) 137 U. S. 661; St. Louis *v.* Rutz, (1891) 138 U. S. 226; San Francisco *v.* Le Roy, (1891) 138 U. S. 656, 671; Knight *v.* Land Association, (1891) 142 U. S. 161, 183; Kaukauna Water Power Co. *v.* Green Bay & M. Canal Co., (1891) 142 U. S. 255; Illinois Central R. R. Co. *v.* Illinois, (1892) 146 U. S. 387; Shively *v.* Bowlby, (1894) 152 U. S. 1; Grand Rapids & I. R. R. Co. *v.* Butler, (1897) 159 U. S. 87; St. Anthony Falls Water Power Co. *v.* St. Paul Water Comrs., (1897) 168 U. S. 349; and, Mobile Transportation Co. *v.* Mobile, (1903) 187 U. S. 479.

Louis v. *Rutz*, (1891) 138 U. S. 226, 242; *Shively* v. *Bowlby*, (1894) 152 U. S. 1, 40; *Grand Rapids & I. R. Co.* v. *Butler*, (1897) 159 U. S. 87; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Comrs.*, (1897) 168 U. S. 349. But, resting as this last rule necessarily does upon the ownership of such waters by the States, it can have no application to the proposition that rights in and to the land beneath the non-navigable waters of the public domain which belong to the United States, are to be determined solely by the law of the States. On the contrary, the decision that the right to the property belonging to the States is to be determined by the State law, because of the State ownership, involves the converse proposition that the effect of a grant of land and waters in the public domain of the United States, which are not navigable, and, therefore, belong to the United States, is to be determined by the law of the United States.

The ownership by the United States of the public domain being thus unquestionable, there can be no room for the contention that the quantity and character of property in the public domain which passes by grant from the United States is not to be exclusively measured by the law of the United States, because of want of power in the United States over the subject matter of sale of the public domain. Such a contention would be obviously without merit, in view of the express delegation of authority concerning the property of the United States, contained in the third section of the fourth article of the Constitution, whereby Congress was vested with power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

The comprehensive system of legislation, beginning with the very birth of the government, providing for the survey and sale of the public domain, the administrative machinery devised for executing these laws and the multitude of decisions of this court concerning questions which have arisen thereunder, which have ever been deemed proper to be determined solely from a consideration of the laws of the United States, to my mind serve to demonstrate the unsoundness of the proposition that any other law than that of the United States measures the nature and extent of title to the public domain conveyed by authority of the laws of the United States.

Besides the implication resulting from the general legislation of Congress concerning the sale and disposition of the public domain, the special statutes granting rights in and regulating the use of the non-navigable waters upon the public lands are very conclusive. (Act of July 26, 1866, 14 Stat. 253; Act of March 3, 1877, 19 Stat. 377; Act of March 3, 1891, 26 Stat. 1095; Act of June 17, 1902, 32 Stat. 388.) See, in this connection, *Gutierres* v. *Albuquerque Land & Irrigation Co.*, (187 U. S. ,) and *United States* v. *Rio Grande Dam and Irrigation Co.*, (174 U. S. 609, 704, *et seq.*)

I refer to a few cases in which the complete and efficient power of the United States and the controlling effect of its laws have been considered and lucidly stated.

In *Bagnell* v. *Broderick*, (1839) 13 Pet. 436, it was held that a State legislature was not competent to declare a certificate of purchase of equal dignity with a patent; and it was observed (p. 450):

"Congress has the sole power to declare the dignity and effect of titles emanating from the United States."

Wilcox v. *Jackson*, (1839) 13 Pet. 498, was an action in ejectment, brought in a State court of Illinois, to recover property which had at one time been part of a military post. The plaintiff based his claim upon a register's certificate, which the laws of Illinois declared to be evidence of title sufficient to support an action in ejectment. In reversing the judgment for the plaintiff, the court, in the course of the opinion, speaking through Mr. Justice Barbour, said (p. 516):

"It has been said that the State of Illinois has a right to declare by law that a title derived from the United States, which by their laws is only inchoate and imperfect, shall be deemed as perfect a title as if a patent had issued from the United States, and the construction of her own courts seems to give effect to her statute. . . . We hold the true principle to be this, that whatever the question in any court, State or Federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, that the property, like all other property in the State, is subject to State legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

Irvine v. *Marshall*, (1858) 20 How. 558, was an action originally brought in a court of the Territory of Minnesota. It was alleged that the defendant Marshall, as the agent of the plaintiff, had purchased certain public lands with funds belonging to plaintiff and a co-defendant; that Marshall thereafter took a patent certificate in his own name and refused to convey an undivided half of the land to the plaintiff. The bill of complaint was demurred to upon the ground that the action could not be maintained because of certain provisions of the Territorial statute relating to resulting trusts. Applying its previous ruling in *Wilcox* v. *Jackson*, the court, the course of the opinion, speaking through Mr. Justice Daniel, said (p. 563):

"Within the provisions prescribed by the Constitution, and by the laws enacted in accordance with the Constitution, the acts and powers of the Government are to be interpreted and applied so as to create and maintain a *system*, general, equal, and beneficial as a whole. By this rule, the acts and the contracts of the Government must be understood as referring to and sustaining the rights and interests of all the members of the Confederacy, and as neither emanating from, nor intended for the promotion of, any policy peculiarly local, nor in any respect dependent upon such

policy. The system adopted for the disposition of the public lands embraces the interests of all the States, and proposes the equal participation therein of all the people of all the States. This system is, therefore, peculiarly and exclusively the exercise of a Federal power. The theater of its accomplishment is the seat of the Federal Government. The mode of that accomplishment, the evidences or muniments of right it bestows, are all the work of Federal functionaries alone."

In *United States* v. *Gratiot*, (1840) 14 Pet. 526, 537, considering an objection that Congress was without power to lease the public lands, it was said (p. 537):

"Congress has the same power over the public lands as over any other property belonging to the United States; and this power is vested in Congress without limitation."

In *Gibson* v. *Chouteau*, (1872) 13 Wall. 92, a State statute of limitations was held ineffective as against a patent from the United States. The court, speaking through Mr. Justice Field, said (p. 99):

"The same principle which forbids any State legislation interfering with the power of Congress to dispose of the public property of the United States also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal in Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued."

In *Fink* v. *O'Neill*, (1882) 106 U. S. 283, Mr. Justice Matthews delivering the opinion of the court, considering the fourth section of the homestead act of May 20, 1862, which provided that no lands acquired thereunder should in any event become liable to any debt contracted prior to the issuing of the patent therefor, it was declared that Congress by such provision had made the exemption of such lands from sale on execution a *permanent* part of the national policy.

In *Packer* v. *Bird*, (1891) 137 U. S. 661, the court passed on the extent of the grant contained in a patent of the United States, to land in California, one portion whereof abutted on the Sacramento River. The patent was issued upon a decree of confirmation on a previously existing right or equity of the patentee to the lands, and the survey made pursuant to the decree was incorporated in the patent. In the course of the opinion, speaking through Mr. Justice Field, the court said (p. 669):

"The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the

ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee."

In *Shively* v. *Bowlby*, (1894) 152 U. S. 1, 44, Mr. Justice Gray, delivering the opinion, the language just quoted was approvingly referred to; and Mr. Justice Peckham, speaking for the court, in *St. Anthony Falls Water Power Co.* v. *Water Commissioners*, (1897) 168 U.S. 349, 362, again approvingly referred to the statement.

How completely these authorities apply to this case becomes, I think, manifest when it is borne in mind that the question is whether the United States by the conveyance which it made of the land abutting on the water parted with the title which it confessedly owned prior to the conveyance, to the beds of the lake emselves. The reservation as to rights and incidents referred to in the excerpt made above from the opinion in *Packer* v. *Bird*, is but a reiteration of the doctrine enunciated by the court in the concluding sentences of the opinion in *Irvine* v. *Marshall*, *supra*, and its import is further shown by the opinion in *Barney* v. *Keokuk*, (94 U. S. 324.) In the latter case, the question presented was what rights in the beds of navigable streams attached to abutting lands conveyed by grants of the United States, and the court said that as the beds of navigable waters within a State were the property of the State, by virtue of its sovereignty, no rights in the bed of such a stream could be conferred by a conveyance from the United States, unless the State law vested such rights in the owners of the upland without reference to the source from which the title to the upland had been derived. If such be the power of the States as to navigable waters which they hold in trust, it necessarily follows that what rights pass by a conveyance from the United States to land under non-navigable waters must be determined by the laws of the United States, to whom such land and water when situated in the public domain belong in absolute ownership.

The ownership in the United States and its exclusive power under the Constitution to administer and control its property being thus demonstrated, it follows that the State law is not the proper criterion by which to ascertain what the United States conveyed, and, therefore, there is a Federal question to be examined.

The court below held although the United States survey had not, in fact, been extended beyond the meander line and the lots conveyed by the United States were described as fractional on the plat and in the patents, that the patentees yet took full subdivisions. The principle applied was this: Where marsh land or non-navigable waters were within a meander line upon which fractional lots were abutted, the conveyance of such lots by

the United States carries also the marsh land or non-navigable water beyond the meander to the extent of a full subdivision. And in order to accomplish this result the marsh land and water inside of the meander will be considered to have been surveyed, and the lines of the survey be hence protracted across the meander so as to embrace a full subdivision. Whilst this theory was plainly irreconcilable with the construction given to the United States law by the Supreme Court of Indiana in cases decided by it prior to *Stoner* v. *Rice*, *ub. sup.*, that case announced the rule, and the subsequent cases in Indiana have sanctioned it down to and including *Kean* v. *Roby*, upon which the decision in this case was rested. In *Hardin* v. *Jordan* the doctrine of *Stoner* v. *Rice* was criticized as an unwarranted departure from the common law, and it was observed—as was undoubtedly the case—that the Indiana court in *Stoner* v. *Rice* but adopted the rule announced by the Supreme Court of Michigan in *Clute* v. *Fisher*, (65 Mich. 48,) decided in 1887, shortly before the decision in *Stoner* v. *Rice*. Now, the opinion in *Clute* v. *Fisher* shows that the Michigan court in that case but followed a prior ruling made by it at the same term, in *Palmer* v. *Dodd*, (64 Mich. 474.) The latter case involved title to land within a section made fractional by a meandered lake or marsh, and the controversy turned upon whether under the law of the United States the rights of the owner of the fractional section extended beyond the meander line. The Supreme Court of Michigan, in deciding the question, said:

"When the United States grants by patent land described by a legal subdivision the grantee is entitled to all the land embraced within the legal subdivision contained in his grant, and is not limited by the number of acres specified in the patent or upon the government plat. The meanders have no significance as boundaries, and are not intended as such. They are run simply to afford a means of computing the area contained in the fraction which the United States requires payment for on sale of the public domain. But no grantee by such patent, granting a legal subdivision of land, can derive title to land upon another legal subdivision. This we have decided in the cases of *Wilson* v. *Hoffman*, 54 Mich. 246; *S. C.*, 20 N. W. Rep. 37; *Keyser* v. *Sutherland*, (Mich.) 26 N. W. Rep. 865—which were based upon the decision of the Supreme Court of the United States in *Brown's Lessees* v. *Clements*, 3 How. 650."

It is hence apparent that the rule in *Clute* v. *Fisher* was based upon the construction of the law of the United States expounded by this court in *Brown* v. *Clements*, (3 How. 650.) But long prior to the decision in *Clute* v. *Fisher* this court, in *Gazzam* v. *Phillips*, (1857) 20 How. 372, had reviewed the case of *Brown* v. *Clements*, and decided that the sale of a fractional lot did not convey a full subdivision; and in consequence of this view the case of *Brown* v. *Clements* was expressly overruled. In subsequent cases in Michigan the fact that that court had mistakenly predicated its conclusion in *Clute* v. *Fisher* on a case which this court had

overruled, has been conceded. (*Grand Rapids Ice & Coal Co.* v. *South Grand Rapids Ice & Coal Co.*, 102 Mich. 227.) But whilst the Michigan court has thus recognized the error into which it inadvertently fell in *Clute* v. *Fisher*, the Indiana court has continued to apply that rule, although the sole authority upon which it rests has been repudiated.

Besides the error in the ruling below which is thus shown to exist, the principle applied is moreover in conflict with decisions of this court since the ruling in *Gazzam* v. *Phillips*.

In *Horne* v. *Smith*, (159 U. S. 40,) certain fractional lots appeared by the plat of survey to be bounded on the west by the meander line of the Indian River. It was, however, found as a fact that the water line which was surveyed and made the boundary of the lots was the line of a bayou or savannah, and that there had been an omission to make a survey of the land west of the bayou and between it and the main bed of the Indian River. The court, speaking through Mr. Justice Brewer, said (p. 45):

"Although it was unsurveyed it does not follow that a patent for the surveyed tract adjoining carries with it the land which, perhaps, ought to have been, but which was not in fact, surveyed. The patent conveys only the land which is surveyed, and when it is clear from the plat and the surveys that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it."

In *Niles* v. *Cedar Point Club*, (175 U. S. 300,) it appeared that a survey was made in 1834–1835 of fractional townships in the northern part of Ohio, adjacent to Lake Erie. By the field notes and plat certain sections were shown as fractional, because a tortuous meander line was shown upon the plat of survey upon which the fractional lots abutted. Across this meander line there was a region of country described as a marsh, and agreed in the statement of facts to be a body of low, swamp land, partly boggy and partly dry, stretched beyond to the shores of Lake Erie. The claim of the owner of the abutting lands was that his boundary was not the meander at the edge of the marsh, but Lake Erie. By referring to the plat previously excerpted in reviewing one of the Tolleston Club cases, showing the situation of the land which was in controversy in those cases, it will be seen that the precise condition passed upon in those cases was involved in *Niles* v. *Cedar Point Club*, *supra*. With the exact situation confronting it, instead of applying the erroneous rule announced in Indiana, this court held that the purchaser of the fractional lots abutting on the meander did not take a complete subdivision, but was confined by the meander line and got only the land which he bought and paid for. The court, speaking through Mr. Justice Brewer, said (p. 306):

"It appears distinctly from the field notes and the plat that the surveyor, Rice, stopped his surveys at this 'marsh,' as he called it. These surveys were approved and a plat prepared, which was based upon the surveys and field notes, and showed the limits of the tracts which were for

sale. The patents, referring in terms to the survey and plat, clearly disclose that the government was not intending to and did not convey any land which was a part of the marsh.

* * * * * *

"It may be that surveyor Rice erred in not extending his surveys into this marsh, but his error does not enlarge the title conveyed by the patents to the surveyed fractional sections. The United States sold only the fractional sections, received only pay therefor, an amount fixed by the number of acres conveyed, and one receiving a patent will not ordinarily be heard to insist that by reason of an error on the part of the surveyor more land was bought than was paid for, or than the government was offering for sale."

And the same meaning was attributed to a meander line in *French-Glenn Live Stock Co.* v. *Springer*, (185 U. S. 54.)

But it is said the State of Indiana was entitled to the land under the beds of the lakes in and by virtue of the act of Congress of September 28, 1850, known as the swamp land act, and, therefore, the error committed below, as to the meaning of the survey and patents, is without importance. But the State could not acquire a legal title to land under the swamp land act except by patent, (*Niles* v. *Cedar Point Club*, 175 U. S. 309; *Brown* v. *Hitchcock*, 173 U. S. 473; *Rogers' Locomotive Machine Works* v. *American Emigrant Company*, 164 U. S. 559, 574; *Michigan Land and Lumber Co.* v. *Rust*, 168 U. S. 589, 592,) and such patent must have been based upon a survey, as the statute clearly contemplated the selection and patenting only of "legal subdivisions." (Act Sept. 28, 1850, 9 Stat. 519.) The survey having stopped at the bank, and the bed of the lake not having been surveyed, platted or subdivided, or the area thereof ascertained, no right of the State had attached to the lake bed land under the swamp land act. Indeed, whilst some of the earlier cases in Indiana construed the swamp land act in direct conflict with the meaning of that act as interpreted by this court in the cases above cited, in a later case (*Tolleston Club* v. *State*) the Indiana court, on the rehearing, pointed out that under a correct construction of the swamp land act a survey and a patent were essential prerequisites to the passing of rights to the State under the swamp land act. And the confirmatory act of March 3, 1857, (11 Stat. 251,) clearly has no application, as patents had issued in 1853 upon all the selections made for the State.

The mind cannot fail at once to perceive the serious disturbance to vested rights which must follow from the suggestion that title passed to the State of Indiana, under the swamp land act, to land belonging to the United States, which at the time of the issue of the patents to the State had not been surveyed or selected by the Secretary of the Interior for account of the State, and which was not parcelled into legal subdivisions until 1875, when the lake bed land in question was surveyed as the property of the United States.

I am brought, then, to these questions: Did the United States, by running meander lines, lose her title to the lands within such lines? and did she, by issuing patents for the fractional lots abutting on lakes which were thus meandered, convey to her grantees title to the center of the lakes?

It cannot be successfully controverted that from the beginning, both under the Confederation and since the adoption of the Constitution, the laws for the survey and sale of the public domain have contemplated as well the survey and sale of both dry land and land covered by water, except that under navigable waters. This so clearly results from the text of the statutes that I content myself with making reference to the sections of the Revised Statues relating to the subject and to a citation in the margin of some of the earlier statutes.*

The fact that land under non-navigable waters was subject to survey and sale, and the settled practice of meandering navigable streams and making fractional abutting lots, is aptly illustrated by the case of *Surgett* v. *Lapice*, (1850) 8 How. 485. The question presented in that case arose under the act of March 3, 1811, (2 Stat. 662,) relating to the mode of surveying public lands in the Territory of Orleans. By the second section of that act power was conferred to depart from the rectangular mode of survey as respected lands abutting on certain waters in the Territory. Such lands were to be laid out into tracts as near as practicable of a specified frontage and depth on a river or bayou, and to be bounded by such lines as the nature of the country would render practicable and most convenient. By the fifth section of the act certain rights of pre-emption or double concessions in the lands back of tracts fronting on such waters were created under described conditions in favor of the front proprietors, it being provided in the act that double concessions should in no event extend so far in depth as to include lands fit for cultivation "bordering on another river, creek, bayou or water course." Within the area of a double concession involved in the controversy in the case named there was a bayou, and the claim on one side was that the double concession should extend back and embrace the lands on the bayou on the theory that it was non-navigable, while, on the other hand, it was contended that the bayou should be treated as navigable, and that the double concession could not

*Ordinances of Confederation: May 20, 1785 (1 Birchard's Land Laws, p. 11); July 13, 1787, art. 4 (Ib. p. 18); July 23, 1787 (Ib. p. 24); June 20, 1788 (Ib. p. 29); and July 9, 1788 (Ib. p. 33). Acts of Congress: April 21, 1792 (1 Stat. 257); May 5, 1792 (1 Stat. 266); May 18, 1796 (1 Stat. 464); May 10, 1800 (2 Stat. 73); March 3, 1803 (2 Stat. 233); March 26, 1804 (2 Stat. 277); February 11, 1805, (2 Stat. 313); March 2, 1805 (2 Stat. 329); March 3, 1811 (2 Stat. 662); April 24, 1820 (3 Stat. 566); April 5, 1832 (4 Stat. 503). Revised Statutes: Title XXXII, The Public Lands, particularly chapter four (Pre-emptions), chapter five (Homesteads), chapter seven (Sale and Disposal of the Public Lands), and chapter nine (Survey of the Public Lands).

be extended back to embrace the lands bordering on the bayou. Considering the contention that the waters of the bayou in question, though non-navigable, came within the description of water courses recited in the act, the court said (p. 69):

"To what description of water course did the legislature refer? The enacting clause provides that every person who owns a tract of land, 'bordering' on any river, creek, bayou, or water course, shall have the right of pre-emption to the back land. The act of 1811 has been construed, in the Department of Public Lands, for nearly forty years, to mean that those owners whose lands fronted on a navigable stream were only provided for; and that the word 'border,' both in the enacting clause and in the exception, meant to front on a navigable water course; that is to say, such waters as are described in the third section of the act of February 20, 1811, by which Louisiana was authorized to form a State constitution and government, by which act the river Mississippi, and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, were declared to be common highways, and forever free, as well to the inhabitants of the said State, as to other citizens of the United States.

"Similar provisions as respects navigable waters are common to other States where there are public lands, and the practice has been uniform to survey and sell the lands 'bordering' on navigable streams as fractional sections; nor is the channel ever sold to a private owner. Of necessity, it had to be left almost exclusively to the Department of Lands executing the public surveys to ascertain what stream was navigable, and should be bordered by fractions and reserved from sale; and on the other hand, what waters were not navigable, and should be included in square sections, and the channel sold."

Whilst, of course, the case arose under the act of 1811, the opinion points to the general rule obtaining for years in the Land Department on the subject of the sale of land under non-navigable waters and the exclusion of land forming the beds of navigable or public waters from survey and sale.

Without presently developing this subject further, I append in the margin* a reference to acts of Congress, rules of the Land Department

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* Act of July 1, 1870 (16 Stat. 187); Act of July 11, 1873 (17 Stat. 409); Act of February 19, 1874 (18 Stat. 16); Act of December 21, 1874 (18 Stat. 293); Manual of Surveying Instructions, February 22, 1855, approved by Congress, May 30, 1862 (12 Stat. 409); Instructions of Commissioner of General Land Office of July 13, 1874 (Copp's Public Land Laws, p. 765); Report of Commissioner of General Land Office, 1868 (p. 131); Manual of Surveying Instructions, May 3, 1881 (p. 34), January 1, 1890 (p. 33), and June 30, 1894 (p. 57), which last was approved by act of August 15, 1894 (28 Stat. 985); Report of the Commissioner of the General Land Office, 1877 (p. 11); Letter of Secretary of Interior in response to a resolution of the House of Representatives respecting the survey of Lakes Wolf and George in Indiana and Illinois (H. R. Ex. Doc., no. 83, 45th Congress, 2d session); Report of the Commissioner of the General Land Office, in response to Senate resolution of January 14, 1896, giving information relative to certain lakes in Louisiana (Sen. Doc., no. 101, 54th Congress, 1st session).

governing surveys and reports of the executive officers charged with the survey and disposition of the public domain, which beyond peradventure show that from the very beginning of the government up to the decision in *Hardin* v. *Jordan*, the general practice was to treat the land under non-navigable waters as the property of the United States, and to survey and sell the same as part of the public domain. Indeed, the proposition just stated is established by the facts disclosed in the various cases decided by the Supreme Court in Indiana which I have at the outset reviewed.

Whilst, as pointed out in *Surgett* v. *Lapice*, the existence of a navigable stream was the reason which usually occasioned a meander line, and hence fractional subdivisions, the provisions of the surveying laws, both under the Confederation and since, contemplated such a meander line also wherever there existed an Indian reservation or private land claim which at the time of the survey was made prevented the extension of the public surveys. But it is apparent that from an early day meander lines and resulting fractional sections came to be established not only when occasioned by navigable rivers, Indian reservations or private land claims, but from other causes. Thus where the deputy surveyor encountered a morass or swamp which he deemed impassable or such a body of non-navigable water as in his judgment it would not be profitable then to survey, a meander line would be run and fractional sections created. When this practice first originated, and whether the surveyor general of the respective surveying districts applied uniform rules concerning it, the official documents of which I can take judicial notice do not enable me to determine. But certain it is that the practice prevailed prior to 1827. This is evidenced by a communication from the Land Department to the surveyor general at Washington, Mississippi, dated January 30, 1827, (2 Birchard's Comp., p. 862,) and also by a letter from the Commissioner to the surveyor general at Cincinnati, Ohio, dated March 11, 1836, (Ib. 962.) That complaint was sometimes made that deputy surveyors had mistakenly meandered marsh land, which it was asserted should have been surveyed, subdivided and platted is also indicated by the official communication last referred to. The practice as to non-navigable lakes above alluded to is moreover shown by the meandering of the very lakes here in controversy (Wolf and George) as early as 1835, of Beaver Lake and the lands adjacent to the Calumet River about the same time, as shown by the Indiana decision in the Portsmouth Bank and Tolleston Club cases, and of Cross, Soda, Clear and Fairy Lakes in Louisiana in 1839. (Sen. Doc. 101, 54 Cong. 1st session.)

The general practice as to meandering lakes and ponds prevailing in the surveying districts created prior to 1850 is, however, conclusively shown by the "Manual of Instructions" dated February 22, 1855, issued by the Land Department for the guidance of the surveyors and deputy surveyors.

In a letter transmitting this manual, the Commissioner of the General Land Office directed attention to the fact that it was a revised edition of the previous instructions on the subject. Among the instructions contained in this manual was the following (Lester Land Laws, p. 714):

"3. You are also to meander, in manner aforesaid, all *lakes* and deep ponds of the area of twenty-five acres and upwards; also navigable bayous; *shallow* ponds, readily to be drained, or likely to dry up, are not to be meandered."

This manual was approved by Congress on May 30, 1862 (12 Stat. 409.) Like manuals, reiterating the instructions above referred to, were issued on May 3, 1881, January 1, 1890, and June 30, 1894 (p. 57); and the manual of 1894 was approved by Congress on August 15, 1894. (28 Stat. 285.)

Whilst the statements already made are sufficient to demonstrate that the rule contained in the manuals but substantially expressed the practice prevailing from the beginning, such fact is additionally demonstrated by the report of the Commissioner of the General Office for 1868, (p. 131,) wherein, referring to the rule, he said that in substance it but reiterated the practice always followed in the Land Department.

There is in reason then no support for the proposition announced in some cases decided by State courts—presumably on the authority of the rule in *Hardin* v. *Jordan*—that the stopping of a survey at the margin of a non-navigable body of water and the meandering of the same operate to deprive the United States of the title to land within the meanders, which the United States had owned before the meander lines were run. To say this would be only to declare that power existed in the executive officers of the government to strip the United States of its property by a mere method of survey, when from the beginning no authority to that effect had been conferred, and no such purpose was contemplated. The practice of the government and the decisions of this court, it seems to me, leave no room for controversy on this subject. Thus, where a navigable stream was meandered, and within the meander lines were unsurveyed islands forming part of the public domain of the United States, and a request was subsequently made under the provisions of the statutes of the United States for their survey, (12 Stat. 410,) the practice of the department was to comply with the request and survey and dispose of the islands as parts of the public domain. (Report Land Office, 1868, p. 121.) And, as said in the same report, in referring to the rule prevailing from the beginning concerning the meandering of lakes and ponds, where, subsequently to such meandering, lake beds were reported as dry, they "were surveyed and brought into the market. In all these instances the United States has but exercised the ordinary right of proprietorship."

The decisions of this court already referred to conclusively establish at the same time that the mere running of a meander line did not affect the title of the United States to the land within such meanders. Without going over all the cases, it suffices to call attention on this point to *Gazzam* v. *Phillips*, (20 How. 372,) and *Niles* v. *Cedar Point Club*, (175 U. S. 300.) Quite recently the subject was again passed upon in *United States* v. *Mission Rock Company*, 188 U. S. .) In that case there existed in navigable waters a small island, and whilst the title of the State to the land under the navigable waters was sustained, the title of the United States to the island was upheld.

The prior title of the United States being unaffected by the meander, did the conveyance by the United States of a specified quantity of land contained in described fractional lots abutting on a meander, the land under water within the meanders being unsurveyed and unplatted, convey by legal intendment more than the grant purported to embrace?

It cannot be controverted that at common law, as elaborately pointed out in *Hardin* v. *Jordan*, the owner of land abutting on an unnavigable body of water, by conveying the upland as bounding on the water, without restriction or reservation in the deed, in legal effect caused the center of the stream to be the boundary of the land conveyed. But, it seems to me, it cannot be questioned that the statutes of the United States relating to the disposal of the public domain confer no power whatever to sell unsurveyed public land nor do such statutes invest courts with the authority to enlarge the grants actually specified in the patents of the United States. A grant by the United States is to be interpreted by the statutes of the United States, and therefore is not subject to be enlarged by any principle of conveyance beyond the express intendment of the statute under the authority of which the grant is made. The difference between the rules of construction applicable to grants made by a government and the grant made by an individual is that grants of the government are to be strictly construed in its favor and against the grantee; in other words, that nothing passes by the grant but that which is necessarily and expressly embraced in its terms.

The doctrine on this subject was aptly stated by the court in *Shively* v. *Bowlby*, speaking through Mr. Justice Gray, where it was said (152 U. S. 10):

"It was argued for the defendants in error that the question presented was a mere question of construction of a grant bounded by tide water, and would have been the same as it is if the grantor had been a private person. But this is not so. The rule of construction in the case of such a grant from the sovereign is quite different from that which governs private grants. The familiar rule and its chief foundation were felicitously expressed by Sir William Scott: 'All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the preroga-

tives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away.' (*The Rebeckah*, 1 C. Rob. 227, 230.) Many judgments of this court are to the same effect. (*Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 544–548; *Martin* v. *Waddell*, 16 Pet. 367, 411; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 49.)"

Applying this doctrine to the lands in question, as the law of the United States conferred no authority to transfer unsurveyed land and confined the patentee to the land actually described in the patent as strictly construed, it follows that by the issue of its patents for fractional lots abutting on the water the United States did not transfer the title to the beds of the lakes in question within the meander lines.

And the Land Department in executing the acts of Congress and Congress itself in dealing with the subject have so uniformly manifested the purpose that the grants of the United States to land bordering on a non-navigable body of water should not convey the land under the water belonging to the United States beyond the limits of the land actually expressed in the patent as conveyed, that it seems to me the statutes for the disposition of the public domain should be read as if they contained an express provision to that effect.

I have already shown the rule prevailing from the earliest day for the meandering of non-navigable lakes and ponds, and in doing so called attention to the report of the Commissioner of the General Land Office made in 1868, in which he stated that it had been the constant practice from the beginning, after lakes had been meandered and on the lakes becoming dry, to survey and dispose of the beds thereof. As evidencing this practice, I call attention to the following:

The Land Department, on July 13, 1874, (Copp's Public Land Laws, p. 765,) issued directions which were to govern the survey of the bed of non-navigable lakes and other like bodies of water which had been meandered at the time of the original survey and which had become suitable for survey and sale. As the circular of instructions related only to districts where the office of surveyor general had been abolished and could not have been intended to create a rule in such districts different from that obtaining in other districts, the legitimate inference from the instructions is that it was intended to put in effect in such districts the practice usual in other districts where the office of surveyor general had not been done away with. This view finds support in the prelude to the letter forwarding the circular of instructions, which says: "As inquiries arise in regard to the survey of the beds of meandered lakes or other similar bodies of water in districts where the office of surveyor general has been discontinued, the following is communicated," &c. The instructions which fol-

lowed authorized the survey of the beds of such lakes as the property of the United States, when the waters had "so permanently receded or dried up as to leave within the unsurveyed area dry land fit, in ordinary seasons, for agricultural purposes." The remainder of the instructions dealt with the mode of proceeding to have a survey made and title obtained by individuals.

Here, again, as in the case of the rule of 1855, concerning the meandering of non-navigable lakes, the fact that it but in substance formulated the practice prevailing from the beginning, is shown by the report of the Commissioner of the General Land Office made in 1877, (Report, Land Office, p. 11,) where, referring to the practice of the department as to surveying islands situated in navigable waters within a meander and the circular in respect thereto issued in 1868, and also referring to the circular of July 13, 1874, above referred to, it was said:

"The regulations embraced in these circulars were not new in their substance, but were simply a formulation of the pre-existing practice of the office theretofore administered with reference to the class of lands to which they were applicable."

It is then established that from the very beginning of the Government, until at least the date of the circular just referred to, the practice was, after non-navigable bodies of water had been meandered, when the beds thereof became uncovered, to dispose of such beds as the property of the United States, separately from the former border lots. As the record does not disclose the number of instances in which this practice was observed during nearly one hundred years prior to *Hardin* v. *Jordan*, I may not state them, but, as no single instance to the contrary appears, it seems to me that the statment in *Hardin* v. *Jordan*, that the contrary rule had always prevailed, is left without any support whatever, and must have arisen from confounding the uniform practice not to sell the channel of navigable rivers, which belonged to the States, with the uniform practice to the contrary as to non-navigable waters, which belonged to the United States. But, the acts of Congress on the subject are so clear that they leave no room for substantial controversy, and they, in effect, amount to a legislative approval of the construction of the laws of the United States affixed by the administrative officers to those laws from the very foundation of the Government. Thus, on July 1, 1870, (16 Stat. 187,) after the sale of border lots abutting on the meander of a marsh and the Little Calumet River, Congress provided for the survey and sale of the lands within the meanders. So, also, after the patenting to the State of Indiana of the fractional lots abutting on Beaver Lake, Congress, by act of July 11, 1873, (17 Stat. 409,) granted the bed of the lake to the State. Again, by the act of February 19, 1874, (18 Stat. 16,) the bed of a meandered lake, known as Tarkio Lake, situated in Holt County, Missouri, was conveyed

to the county, with a reservation, however, that the county should make title to such person as might have settled upon any portion of the land once part of the bed of the lake, under the homestead and pre-emption laws. Yet a further illustration, which, because of its brevity and importance, is excerpted in full. Congress passed an act, approved on December 21, 1874, (18 Stat. 293,) which reads as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That so much of the bed of the marsh or pond in sections fourteen, twenty-three, and twenty-six, in township sixteen north, of range twenty east of the fourth principal meridian in the county of Sheboygan, in the State of Wisconsin, as shall or may be reclaimed by draining the water from the same, shall be owned and held, so far as any rights or interests of the United States are concerned, by the owners of the lands abutting upon said marsh or pond, and draining the same to the center or thread thereof, and divided among the several owners adjoining and abutting said marsh or pond, according to the rules of law, upon payment by said adjoining owners into the treasury of the United States of one dollar and twenty-five cents per acre for the amount of land that has been or may be so reclaimed."

But, it is said, although it be conceded that the patentee, under the law of the United States, was confined to the land within the actual boundaries of the fractional lots conveyed, nevertheless if, as a matter of conveyancing, a grant by an individual would be construed under the State law as extending beyond the dry land to the center of the water, such construction should be applied to the patents of the United States. This, however, but asserts the same proposition which I have already fully considered, and whilst seemingly accepting the true meaning of the law of the United States and the interpretation given to it from the beginning, proceeds to overthrow it.

To argue that because conveyances made by individuals are controlled by the law of the States, therefore conveyances made by the United States are likewise so controlled, involves, as I see it, not only a *non sequitur*, but besides amounts to denying, so far as the public domain is concerned, that there is a government of the United States having complete ownership and supreme power in the premises. The suggestion that courts as a matter of convenience will determine by the State law the extent of a grant made by the United States is without force, since courts have no power upon their conception of convenience to deprive the United States of its property by resorting to the laws of a State in order to divest the title of the United States in and to property which it owns, and which it has never voluntarily parted with if its own laws be applied. Moreover, the argument of convenience, when inherently considered, is without merit, since it rests on the assumption that for the purpose of convenience it will be held that what property passed by a grant of the United States is to be measured by a variable standard, the divergent laws of the several

States, instead of the law of the United States operating generally throughout the United States, thus creating uncertainty and confusion by causing it to come to pass that a grant made by the United States in virtue of the authority conferred by the statutes of the United States will mean one thing in one State and a wholly different thing in another.

As pointed out by this court in *Irvine* v. *Marshall*, (20 How. 558, 563,) one of the very objects of the provision of the Constitution conferring ample power upon Congress with respect to the property of the United States was to prevent this very condition of things. In other words, the proposition is that for the sake of assumed convenience a rule of interpretation should be resorted to to bring about the very condition of inconvenience which it was the purpose by the constitutional provision in question to guard against.

Conceding, however, *arguendo*, that a grant by the United States should be construed as a matter of conveyancing by the local law prevailing in a particular State, it nevertheless seems to me clear that the conclusion which the court reaches is erroneous. As has been shown in the Portsmouth Bank case the Supreme Court of Indiana expressly decided that a conveyance of border lots by the State was to be governed, not by the rules of conveyancing applicable to private individuals, but that the power of the State officers, was to be ascertained from the statutes of the State alone; consequently, it was decided that where the State had conveyed the lots abutting on Beaver Lake by the exact description contained in the patents of the United States, such conveyances gave no right to the bed of the lake, because power existed in the officers of the State only to sell lands which had been regularly surveyed and platted. In other words, the local decisions in Indiana establish the exact distinction between the rule of conveyancing applicable to individuals and those controlling the grant by a government, which was pointed out by this court in the passage from the opinion in *Shively* v. *Bowlby*, previously quoted.

Surely, if it be the rule in Indiana that the construction of a grant made by the State of its public lands is to be controlled by the State statutes, it should not now be held that a grant by the United States of its lands situated in Indiana is not to be construed by the statutes of the United States, but by the rules of conveyancing applicable to private grants. In other words, that in dealing with the lands of the United States the Government is to be subjected to the local law of Indiana and yet at the same time be deprived of the rights which are accorded by that law to the State, regarded as a government. To now so hold, it seems to me, is but to declare that it is within the province of the local law to strip the United States of its governmental attributes and reduce it to the condition of a mere private individual. This difficulty cannot be avoided by suggesting that in this particular case the Indiana courts have decided that the transfer of the

border lots carried the beds of the lakes, and hence it must be construed that such land passed by the local law. As has been previously demonstrated, the decision of the Supreme Court of Indiana in this case was in effect predicated on its previous rulings in *Stoner* v. *Rice* and the Tolleston Club cases. In those cases it was declared that the doctrine previously announced in the Portsmouth Bank case was not overruled, but the court proceeded upon the theory that that case was inapplicable, because it held in the subsequent cases that there had been in those cases a survey of the land under water at the time the border lots were conveyed by the United States. This was based not upon any local law, but upon the law of the United States as construed by the State court. That construction being overthrown by the decision of this court in *Gazzam* v. *Phillips* and the many other cases in this court which have followed it, it results *that by the Federal law, upon which the court based its decision, the beds of the lakes did not pass.* And that this result was understood by the Supreme Court of Indiana is shown by the opinion on the rehearing in the Tolleston Club case, where it was expressly declared that if the theory of survey announced by the court was incorrect, it was its opinion that the bed of the lake did not pass and title thereto remained in the United States. The decision now announced, therefore, holds that the question whether the beds of the lakes passed is to be determined by the local law as a matter of conveyancing. When it develops by the decision of the Indiana court that under the local law, as a matter of conveyancing, the beds of the lakes did not pass it is then in effect decided that the beds did pass, because it has been decided by the Supreme Court of Indiana that there had been a survey under the law of the United States, although the fact that there had been none conclusively results from a line of decisions of this court which are not now questioned. It comes then, as my mind sees it, to this: The beds of the lakes did not pass by the local law, and they did not pass by the Federal law correctly construed; but, although passing by neither the Federal nor the local law, they must yet be held to have passed because of a principle of law which it is impossible for me to state, because my mind does not perceive it.

Pretermitting, however, this view, and considering the case as controlled by the rule of *Hardin* v. *Jordan*, it only remains to determine whether, under the principle of *stare decisis*, my duty is to assent to its application in the case at hand. Undoubtedly, since *Hardin* v. *Jordan* was decided rights of property may have accrued predicated on the ruling made in that case, but it is also unquestionable that rights of property which had vested prior to that ruling under the acts of Congress, and the settled construction and practice of the government prevailing for almost a century would be divested if that case were applied. Indeed, the case in hand is but an illustration of this fact, since patents of the

United States to land once forming part of the beds of the lakes which are in controversy in this case were issued prior to the decision in *Hardin* v. *Jordan*. Two classes of rights of property then must be considered—the one resting on the true rule existing from the foundation of the Government, and the other upon the mistaken theory of *Hardin* v. *Jordan*. I do not feel at liberty to indulge in the conjecture that the rights which were brought into existence during a century are less important than those which may have arisen in the comparatively short period since the decision in *Hardin* v. *Jordan*. Putting this view aside, if only the rights of those who had actually received the patents of the United States for the beds of the lakes which had once been meandered were concerned, it might be that I should consider it my duty to accept as controlling, under the rule of *stare decisis*, the decision in *Hardin* v. *Jordan*, and thus deprive the plaintiffs in error, whose rights are here at issue, of their property, and this upon the assumption that the legislative department of the Government would rectify the wrong which would be thus inflicted. My mind, however, cannot escape the conviction that the consequence of adhering to the doctrine of *Hardin* v. *Jordan* cannot be limited merely to the rights of those who may have in the past actually acquired from the United States title to land once forming the beds of meandered lakes. On the contrary, that doctrine strips the United States of the title to the bed of every pond or lake which was meandered during the nearly a century which preceded the decision in *Hardin* v. *Jordan*, where the lots bordering on such meandered lakes had been disposed of by the United States. This shows the inadequacy of the suggestion that the United States may, by a change of the form of conveyancing, obviate the doctrine now maintained. Whatever be the change in the rules of conveyancing, whenever the bed of a meandered lake hereafter becomes fit for sale, the question must recur and call for a reiteration of the ruling now made. Under these circumstances, the line upon which I should act seems to me to have already been plainly pointed out by the court in *Gazzam* v. *Phillips*, *supra*. There the court, as I have said, having been called upon to consider the correctness of the rule announced by it twelve years before in *Brown* v. *Clements*, (3 How. 650,) and having concluded that that case had been wrongly decided, was required to determine whether it was its duty under the rule of *stare decisis* to perpetuate an erroneous principle or apply a correct one. In deciding to follow the latter course, the reason which controlled to the conclusion is so directly applicable to the subject matter of this case, and was so frankly and ably stated, that I excerpt a passage from the opinion, as follows (p. 378):

"It is possible that some rights may be disturbed by refusing to follow the opinion expressed in that case; but we are satisfied that far less inconvenience will result from this dissent, than by adhering to a principle

which we think unsound, and which, in its practical operation, will unsettle the surveys and subdivisions of fractional sections of the public land running through a period of some twenty-eight years. Any one familiar with the vast tracts of the public domain surveyed and sold, and tracts surveyed and yet unsold, within the period mentioned, can form some idea of the extent of the disturbance and confusion that must inevitably flow from an adherence to any such principle. We cannot, therefore, adopt that decision or apply its principles in rendering the judgment of the court in this case."

Concluding that the patents of the United States to the State of Indiana for the fractional lots abutting upon Wolf Lake and Lake George did not convey title to land under the water, and that the patents subsequently issued by the United States, based upon the Wolcott survey of 1875, purporting to pass the title to land once a part of the beds of the lakes were valid, I dissent.

I am authorized to say that Mr. Justice McKenna joins in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.